

No. 16130 ✓

Vol. 3092

United States
Court of Appeals
for the Ninth Circuit

METROPOLITAN LIFE INSURANCE COM-
PANY, a corporation, Appellant,

vs.

MARGARET L. GRANT, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

FILED

OCT 30 1958

PAUL P. O'BRIEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Amended Complaint, First.....	23
Answer to First Amended Complaint.....	29
Answer to Complaint.....	18
Appeal:	
Certificate of Clerk to Transcript of Record on	48
Notice of	45
Order Extending Time to Docket.....	47
Statement of Points and Designation of Record on	236
Stipulation Concerning Consideration of Original Exhibits on.....	243
Supersedeas and Cost Bond on.....	45
Bond on Removal.....	15
Certificate of Clerk to Transcript of Record...	48
Complaint	7

ii.

Exhibit A—Part A of Application of Peter Grant and Receipt.....	13
Designation of Record Material to Consideration of Appeal (USCA).....	241
Dismissal of First Cause of Action.....	34
Docket Entries, Excerpt From.....	37
Findings of Fact and Conclusions of Law.....	38
First Amended Complaint.....	23
Judgment	43
Memorandum Opinion	35
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	45
Notice of Petition for Removal.....	17
Opinion, Memorandum	35
Order Extending Time to Docket Appeal.....	47
Petition for Removal.....	3
Exhibit A—Summons and Complaint.....	6
Removal Bond	15
Statement of Points To Be Relied Upon and Designation of Record on Appeal (USCA) ..	236
Stipulation Concerning Consideration of Original Exhibits (USCA).....	243
Summons	6
Supersedeas and Cost Bond on Appeal.....	45

Transcript of Proceedings and Testimony.....	50
--	----

Exhibits for Plaintiff:

1—Part A Only of Plaintiff's Exhibit No. 1, Being Part A Only of Entire Appli- cation	244
2—Receipt	245
3—Questionnaire	246
4—Life Inquiry	247
5—Aviation Questionnaire	248
6—Medical Certificate	249

Exhibits for Defendant:

A—Letter From Company's Manager Wigham in Monterey to Company's Head Office in San Francisco, Dated June 28, 1954.....	250
B—Copy of Letter From Company's Chief Underwriter in San Francisco to Com- pany's Monterey Office, Dated July 6, 1954	251
C—Letter From Company's Manager Wigham in Monterey to Company's Head Office in San Francisco, Dated July 15, 1954.....	252
D—Letter From Company's Chief Under- writer in San Francisco to Company's Manager in Monterey, Dated July 20, 1954	253

Transcript of Proceedings—(Continued):

Exhibits for Defendant—(Continued):

E—Letter From Company's Manager Wigham in Monterey to Company's Head Office in San Francisco, Dated July 26, 1954.....	254
F—Letter From Company's Chief Under- Writer in San Francisco to Company's Manager in Monterey, Dated July 30, 1954	255
G—Letter From Company's Manager Wigham in Monterey to Company's Head Office, Dated August 20, 1954....	256
Motion to Dismiss Complaint at Close of Plaintiff's Testimony	145
Opening Statement by Mr. Brauer.....	50
Opening Statement by Mr. Walsh.....	52
Stipulation to Augment Record.....	234
Witnesses for Plaintiff:	
Kenny, Margaret	
—direct	89, 104
—recalled, cross	128, 138
—redirect	143
—recross	144
Price, George	
—direct	56
—cross	69, 79
—redirect	85

Transcript of Proceedings—(Continued):

Witnesses for Plaintiff—(Continued):

Sambuck, Antone J.

—direct	116
—cross	124
—redirect	127

Witnesses for Defendant:

Kenny, Margaret L.

—direct	153
---------------	-----

Price, George

—direct	191, 202
—cross	205
—redirect	215

Svendsen, Jonas

—direct	219
---------------	-----

Wigham, Alan C.

—direct	156
---------------	-----

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In the District Court of the United States, North-
ern District of California, Southern Division

Civil No. 35022

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COM-
PANY, a New York corporation,
Defendant.

PETITION FOR REMOVAL OF CIVIL AC-
TION FROM THE SUPERIOR COURT OF
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SANTA CRUZ TO THE
DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DIS-
TRICT OF CALIFORNIA, SOUTHERN
DIVISION

To the Honorable Judges of said District Court
of the United States:

The Petition of Metropolitan Life Insurance
Company, a corporation, the Defendant above-
named, respectfully shows:

I.

That a Civil Action has been brought and is now
pending in the Superior Court of the State of Cali-
fornia in and for the County of Santa Cruz, a State
Court, wherein Margaret L. Grant is Plaintiff and
the Petitioner, Metropolitan Life Insurance Com-

pany, a corporation, is Defendant, which Action is designated by Number 28133 records of said Court and is hereinafter referred to as said Santa Cruz County Action Number 28133.

II.

That said Santa Cruz County Action Number 28133 is a Civil Action of which the District Courts of the United States have original jurisdiction because the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs and is between citizens of different States as more fully set forth hereinafter.

III.

That Defendant hereby petitions to remove said Santa Cruz County Action Number 28133 to this Court upon the ground and for the reason that said Action involves a controversy which is wholly between citizens of different States in that Margaret L. Grant, the Plaintiff, was at the time of the commencement of said suit a citizen and resident of the State of California and the Defendant, Metropolitan Life Insurance Company, a corporation, was at the time of the commencement of said suit and now is a corporation incorporated under the laws of the State of New York with its principal office in the City of New York, State of New York, and is a citizen and resident of said State of New York; that said Metropolitan Life Insurance Company was not, at the time of commencement of said suit nor is it now, a resident or citizen of the State of California.

IV.

That the Plaintiff in said Santa Cruz County Action Number 28133 is suing Petitioner herein, as Defendant, for the sum of Fifteen Thousand Dollars (\$15,000.00) plus interest.

V.

That said Santa Cruz County Action No. 28133 was commenced on or about October 7, 1955; that all process Pleadings and Orders served upon Petitioner in said Action are a copy of Summons and Complaint which was served on Defendant on October 10, 1955: that a true and correct copy of said Summons and Complaint is attached hereto marked "Exhibit A" and filed herewith.

VI.

That Petitioner herewith presents a good and sufficient bond in the sum of Two Hundred Fifty Dollars (\$250.00) conditioned that Petitioner, the Defendant, will pay all costs and disbursements incurred by reason of these removal proceedings should it be determined that said Action was not removable or was improperly removed.

Wherefore, Petitioner prays that the said Santa Cruz County Action Number 28133 be removed from said State Court into this Court for trial and determination; that this Court accept said bond and henceforth entertain exclusive jurisdiction over said Action.

/s/ BURTON L. WALSH,

/s/ RICHARD J. KILMARTIN,

KNIGHT, BOLAND & RIORDAN,

Attorneys for Petitioner, Metropolitan
Life Insurance Company

EXHIBIT "A"

In the Superior Court of the State of California,
in and for the County of Santa Cruz

No. 28133

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COM-
PANY, a New York corporation,
Defendant.

Action brought in the Superior Court of the State
of California, in and for the County of Santa
Cruz, and the Complaint filed in said County
of Santa Cruz, in the office of the Clerk of said
Superior Court.

The People of the State of California Send Greet-
ing to Metropolitan Life Insurance Company,
a New York corporation, Defendant:

You are Hereby Directed to Appear and Answer
the complaint in an action entitled as above, brought
against you in the Superior Court of the State of
California, in and for the County of Santa Cruz,
within ten days (exclusive of the day of service)
after the service on you of this Summons—if served
within this County, or within thirty days if served
elsewhere.

And you are hereby notified that unless you ap-
pear and answer as above required, the said plain-

Exhibit "A"—(Continued)

tiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and the seal of said court this 7th day of October, 1955.

[Seal] TOM M. KELLEY,
 Clerk

[Title of Superior Court and Cause No. 28133.]

COMPLAINT

Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On or about May 1, 1950, the defendant in consideration of the monthly payment by one Peter Grant to it, of \$15.05 made and delivered its policy of insurance in writing and thereby insured the life of said Peter Grant. Said policy of life insurance is numbered 20158526A and has heretofore been surrendered by the plaintiff to the defendant pursuant to the terms of said policy and is now in the possession of the defendant. The plaintiff is and was at all times herein concerned the beneficiary named in said policy. By said policy, the defendant undertook to pay to the beneficiary therein named upon the death of said Peter Grant the sum of Five

Exhibit "A"—(Continued)

Thousand Dollars (\$5,000.00) together with dividends as provided for in said policy, as well as an additional sum of Five Thousand Dollars (\$5,000.00) if said Peter Grant died as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent and accidental means.

III.

On August 13, 1954, while said policy was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being a resident of said County, as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent and accidental means, to-wit: as the sole result of the accidental inhalation and absorption of a poisonous substance. Said death occurred less than ninety (90) days after the date of such injuries and not as the result of travel or flight on any species of aircraft upon which said Peter Grant had any duties relating to such aircraft or flight.

IV.

Immediately upon the death of said Peter Grant, defendant became obligated to pay to plaintiff in said County of Santa Cruz, the county of plaintiff's residence, said additional sum of \$5,000.00 which was payable under the terms of the policy because of the death of said Peter Grant by accidental means.

V.

On or about October 21, 1954, the plaintiff fur-

Exhibit "A"—(Continued)

nished the defendant with proof of the death of said Peter Grant and made demand upon the defendant for payment of said additional sum of \$5,000.00.

VI.

Neither the whole nor any part of said additional sum of \$5,000.00 payable because of the death of said Peter Grant by accidental means has been paid.

VII.

Said Peter Grant and the plaintiff have each performed all the terms and conditions of said policy by each agreed to be performed.

As and for a Second, Separate and Distinct Cause of Action against the Defendant, Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first pre-

Exhibit "A"—(Continued)

mium payable on said contract. At said time and place defendant accepted said premium after having previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract.

III.

The plaintiff is and was at all times herein concerned the beneficiary named in said contract.

IV.

On August 13, 1954, while said contract was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being then a resident of said County and State, as the result of the accidental inhalation and absorption of a poisonous substance.

V.

Immediately upon the death of said Peter Grant, defendant became obligated to pay to plaintiff in said County of Santa Cruz, the county of plaintiff's residence, the sum of \$10,000.00, as provided for by the terms of said contract.

VI.

On or about October 21, 1954, the plaintiff furnished the defendant with proof of the death of said Peter Grant and made demand upon the defendant for payment of said sum of \$10,000.00.

VII.

Neither the whole nor any part of said sum of \$10,000.00 has been paid.

Exhibit "A"—(Continued)

VIII.

Said Peter Grant and the plaintiff have each performed all of the terms and conditions of said contract of life insurance by each agreed to be performed.

As and for a Third Separate and Distinct Cause of Action against the Defendant. Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first premium payable on said contract. At said time and place defendant accepted said premium.

III.

Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraph III, IV, V, VI, VII and VIII of her second cause of action.

Exhibit "A"—(Continued)

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon her First Cause of Action: in the sum of \$5,000.00 with interest thereon at the rate of 7% from August 13, 1954;

Upon her Second and Third Cause of Action: in the sum of \$10,000.00 with interest thereon at the rate of 7% from August 13, 1954;

For her costs of suit and for such further relief as the Court may deem just.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By H. F. BRAUER,
Attorneys for Plaintiff

Duly Verified.

Part A
Application to the METROPOLITAN LIFE INSURANCE COMPANY (Herein called "the Company")
(Ordinary Department)

TO BE COMPLETED IN THE CASE OF A WOMAN APPLICANT IF MARRIED

- (b) His age..... (c) His occupation.....
 (d) In what Companies?.....
 (e) Is application on his life now being submitted? If yes, give particulars.....
 (f) How many children have you now living?..... (g) In whose favor?.....
 (h) State age and occupation of each.....

The foregoing statements and answers are true and complete. It is agreed that: 1. The statements and answers in Part A and Part B of the application for this insurance shall

Exhibit "A"—(Continued)

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon her First Cause of Action: in the sum of \$5,000.00 with interest thereon at the rate of 7% from August 13, 1954;

Upon her Second and Third Cause of Action: in the sum of \$10,000.00 with interest thereon at the rate of 7% from August 13, 1954;

For her costs of suit and for such further relief as the Court may deem just.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By H. F. BRAUER,
Attorneys for Plaintiff

Duly Verified.

[Title of District Court and Cause.]

REMOVAL BOND

Know All Men by These Presents: That we, Metropolitan Life Insurance Company as principal, and the United States Fidelity and Guaranty Company, a corporation of the State of Maryland, having an office and usual place of business at 444 California Street, San Francisco, State of California, as Surety, are held and firmly bound unto Margaret L. Grant in the penal sum of Two Hundred Fifty and No/100 Dollars (\$250.00), lawful money of the United States of America, for which payment well and truly to be made, unto the said Margaret L. Grant, heirs, representatives, successors and assigns, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Bond is as follows:

Whereas, the above bounden Metropolitan Life Insurance Company has filed a petition in the District Court of the United States for the Northern District of California, Southern Division, for removal to said Court of a certain Cause No. 28133, now pending in the Superior Court of Santa Cruz County, State of California, wherein Margaret L. Grant is plaintiff and said Metropolitan Life Insurance Company is defendant.

Now, if the said Metropolitan Life Insurance Company shall properly and legally enter into the

said District Court of the United States for the Northern District of California, Southern Division, within twenty (20) days after commencement of the action, or service of process, whichever is later, and shall comply with the provisions of Section 1446, Title 28, United States Code Annotated, as amended, and shall pay all costs that may be awarded if it shall be held that said suit was wrongfully or improperly removed, or that said suit was not properly removed, then this obligation shall be void, otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this 26th day of October, 1955.

[Seal] METROPOLITAN LIFE INSUR-
 ANCE COMPANY,
 /s/ By A. B. BROWN,
 Third Vice President

[Seal] UNITED STATES FIDELITY AND
 GUARANTY COMPANY,
 /s/ By CHRISTINE ROPER,
 Attorney-in-Fact

Notary's Certificates attached.

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

NOTICE OF PETITION FOR REMOVAL OF
CIVIL ACTION FROM THE SUPERIOR
COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA
CRUZ TO THE DISTRICT COURT OF
UNITED STATES FOR THE NORTHERN
DISTRICT OF CALIFORNIA, SOUTHERN
DIVISION

To Margaret L. Grant, Plaintiff, and Her Attor-
neys, Messrs. Wyckoff, Parker, Boyle & Pope:

You and each of you will please take notice that Metropolitan Life Insurance Company, a corporation, Defendant in the above Action has, on the 28th day of October, 1955, petitioned the above entitled Court for removal of the above entitled Civil Action now pending in the Superior Court of the State of California in and for the County of Santa Cruz, and bearing Number 28133 records of said Court, from said Court to the District Court of the United States for the Northern District of California, Southern Division.

You are further notified that on said 28th day of October, 1955, Metropolitan Life Insurance Company presented to and filed with the above entitled Court a good and sufficient bond in the sum of Two Hundred Fifty Dollars (\$250.00) conditioned that Petitioner, the Defendant, would pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that said Ac-

tion was not removable or was improperly removed.

Dated: October 28th, 1955.

/s/ BURTON L. WALSH,
/s/ RICHARD J. KILMARTIN,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Petitioner Metropolitan
Life Insurance Company

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 28, 1955.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Defendant answers plaintiff's Complaint as follows:

As to the First Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations of paragraphs II, III, IV, V, VI and VII, except as herein otherwise admitted.

III.

On or about May 1, 1950, defendant Metropolitan Life Insurance Company made, issued and delivered to Peter Grant its Policy No. 20,158,526 A, insuring his life to the face amount of \$5,000.00 upon a Limited Payment Life Plan in consideration of the application therefor and the monthly premium of \$15.05. The policy provided for the payment of said \$5,000.00 of life insurance at the defendant's home office in the City of New York upon receipt of due proof of the death of the insured, and upon surrender of the policy.

IV.

Margaret L. Grant, wife, is the named beneficiary in said policy.

V.

On October 26, 1954, Metropolitan Life Insurance Company received the policy and due proof that the insured, Peter Grant, died on August 13, 1954, in Santa Cruz County, California, and forthwith paid to Margaret L. Grant, the plaintiff herein, the amount of life insurance, namely, \$5,000.00, plus dividends and interest in the amount of \$43.65, or a total of \$5,043.65. At the time of his death Peter Grant was a resident of Santa Cruz County, California.

VI.

The policy also contained a provision concerning death by accidental means as follows:

“Accidental Means Death Benefit—The Company promises to pay to the Beneficiary under this Policy, in addition to the amount otherwise payable

according to the terms of this Policy, an additional sum equal to the Amount of Insurance shown on page 1, upon receipt at the Home Office of due proof of the death of the Insured, while this provision is in effect, as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent, and accidental means, and that such death shall not have occurred (a) more than 90 days after the date of such injuries, or (b) as the result of or by the contribution of disease or bodily or mental infirmity or medical or surgical treatment therefor or infection of any nature unless such infection is incurred through an external visible wound sustained through violent and accidental means, or (c) as the result of self-destruction, whether sane or insane, or (d) as the result of travel or flight on any species of aircraft if the Insured has any duties relating to such aircraft or flight, or is flying in the course of any aviation training or instruction, or any training or maneuvers of any armed forces, or (e) as a result of participating in or attempting to commit an assault, or (f) as a result of an act of war."

VII.

Further consideration for the issuance of the policy was a written rider dated April 10, 1950, signed by the insured and attached to and made a part of the policy, which rider provides as follows:

"To the Metropolitan Life Insurance Company:

It is understood and agreed that the extra pre-

mium for aviation hazards included in the Life insurance premium applies to the Life insurance only. It does not apply to the Accidental Means Death Benefit which will not be paid if death occurs as the result of travel or flight on any species of aircraft if the insured has any duties relating to such aircraft or flight, or is flying in the course of any aviation training or instruction, or any training or maneuvers of any armed forces.”

VIII.

Plaintiff has demanded of defendant the additional sum of \$5,000.00, but defendant refused the demand, and has not paid any part thereof because the death of Peter Grant was not the result of accidental means as defined in the policy. Peter Grant's death occurred as the result of his duties of flying an aircraft which he crash landed while he was engaged in his occupation of crop duster. He died on August 13, 1954, within a few minutes after said crash landing.

IX.

There is nothing now due from defendant to Plaintiff. Defendant has fully discharged its obligation to plaintiff by the payment of said \$5,043.65.

As to the Second Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California,

and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained in paragraphs II, III, IV, V, VI, VII and VIII of the alleged Second Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954.

III.

There is nothing due from defendant to plaintiff.

As to the Third Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained in paragraphs II and III of said alleged Third Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954.

III.

There is nothing due from defendant to plaintiff.

Wherefore, defendant Metropolitan Life Insurance Company prays judgment in its favor and for its costs of suit.

/s/ BURTON L. WALSH,
KNIGHT, BOLAND & RIORDAN,
Attorneys for Defendant

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 2, 1955.

[Title of District Court and Cause.]

FIRST AMENDED COMPLAINT

Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On or about May 1, 1950, the defendant in consideration of the monthly payment by one Peter Grant to it, of \$15.05 made and delivered its policy of insurance in writing and thereby insured the life of said Peter Grant. Said policy of life insurance is numbered 20158526A and has heretofore been surrendered by the plaintiff to the defendant pursuant to the terms of said policy and is now in the possession of the defendant. The plaintiff is and was at all times herein concerned the beneficiary named

in said policy. By said policy, the defendant undertook to pay to the beneficiary therein named upon the death of said Peter Grant the sum of Five Thousand Dollars (\$5,000.00) together with dividends as provided for in said policy, as well as an additional sum of Five Thousand Dollars (\$5,000.00) if said Peter Grant died as the result, directly and independently of all other cause, of bodily injuries caused solely by external, violent and accidental means.

III.

On August 13, 1954, while said policy was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being a resident of said County, as the result, directly and independently of all other causes, of bodily injuries caused solely by external, violent and accidental means, to wit: as the sole result of the accidental inhalation and absorption of a poisonous substance. Said death occurred less than ninety (90) days after the date of such injuries and not as the result of travel or flight on any species of aircraft upon which said Peter Grant had any duties relating to such aircraft or flight.

IV.

Immediately upon the death of said Peter Grant, defendant became obligated to pay to plaintiff in said County of Santa Cruz, the county of plaintiff's residence, said additional sum of \$5,000 which was payable under the terms of the policy because of the death of said Peter Grant by accidental means.

V.

On or about October 21, 1954, the plaintiff furnished the defendant with proof of the death of said Peter Grant and made demand upon the defendant for payment of said additional sum of \$5,000.

VI.

Neither the whole nor any part of said additional sum of \$5,000 payable because of the death of said Peter Grant by accidental means has been paid.

VII.

Said Peter Grant and the plaintiff have each performed all the terms and conditions of said policy by each agreed to be performed.

As and for a Second, Separate and Distinct Cause of Action against the Defendant, Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first pre-

mium payable on said contract. At said time and place defendant accepted said premium after having previously secured from its home office an approval of said contract of insurance for the class, plan and amount of insurance provided for in said contract.

III.

The plaintiff is and was at all times herein concerned the beneficiary named in said contract.

IV.

On August 13, 1954, while said contract was in full force and effect, said Peter Grant died in the County of Santa Cruz, State of California, being then a resident of said County and State, as the result of the accidental inhalation and absorption of a poisonous substance.

V.

Under said contract of life insurance, and upon the death of said Peter Grant, defendant became obligated to pay to plaintiff the following sums:

(a) the sum of \$100 on the date of death of Peter Grant, namely on August 13, 1954, and a like sum during each and every month thereafter for a total period of twenty years next succeeding said date of death.

(b) the sum of \$10,000 on the twentieth anniversary date of said date of death.

VI.

On or about October 21, 1954, plaintiff furnished defendant with proof of the death of said Peter

Grant and made demand upon the defendant for its performance and payment under said contract of insurance.

VII.

Neither the whole nor any part of the sums due under said contract of insurance has been paid.

VIII.

Said Peter Grant and the plaintiff have each performed all of the terms and conditions of said contract of life insurance by each agreed to be performed.

As and for a Third Separate and Distinct Cause of Action against the Defendant, Plaintiff alleges:

I.

Defendant is a corporation duly organized and existing.

II.

On August 11, 1954, in the City of Watsonville, County of Santa Cruz, State of California, a written contract of life insurance was entered into between the defendant and one Peter Grant, a true copy of which is attached hereto as Exhibit A and incorporated herein. At said time and place, said Peter Grant paid to one George I. Price, an agent of defendant duly authorized to accept said payment for and on behalf of defendant, the sum of \$53.36, that being a sum equal to the full first premium payable on said contract. At said time and place defendant accepted said premium.

III.

Plaintiff realleges and incorporates herein by reference the allegations set forth in paragraphs III, IV, V, VI, VII and VIII of her second cause of action.

Wherefore, plaintiff prays for judgment against the defendant as follows:

Upon her First Cause of Action: in the sum of \$5,000.00 with interest thereon at the rate of 7% from August 13, 1954;

Upon her Second and Third Cause of Action: in the sum of \$100 per month from August 13, 1954 to August 13, 1974 plus the sum of \$10,000 on August 13, 1974, with interest at the rate of 7% per annum on each unpaid installment from the date it fell due to the date of payment.

For her costs of suit and for such further relief as the Court may deem just.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By HARRY F. BRAUER,
Attorneys for Plaintiff

[Exhibit A is set out at page 13 of this printed record.]

Duly Verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 10, 1956.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Defendant answers plaintiff's First Amended Complaint as follows:

As to the First Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations of paragraphs II, III, IV, V, VI and VII, except as herein otherwise admitted.

III.

On or about May 1, 1950, defendant Metropolitan Life Insurance Company made, issued and delivered to Peter Grant its Policy No. 20 158 526 A, insuring his life to the face amount of \$5,000.00 upon a Limited Payment Life Plan in consideration of the application therefor and a written rider hereinafter more fully described and the monthly premium of \$15.05. The policy provided for the payment of said \$5,000.00 of life insurance at the defendant's home office in the City of New York

aviation training or instruction, or any training or maneuvers of any armed forces.”

VIII.

Plaintiff has demanded of defendant the additional sum of \$5,000.00, but defendant refused the demand, and has not paid any part thereof because the death of Peter Grant was not the result of accidental means as defined in the policy. Peter Grant's death occurred as the result of his duties of flying an aircraft which he crash landed while he was engaged in his occupation of crop duster. He died on August 13, 1954, within a few minutes after said crash landing.

IX.

There is nothing now due from defendant to plaintiff. Defendant has fully discharged its obligation to plaintiff by the payment of said \$5,-043.65.

As to the Second Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained

in paragraphs II, III, IV, V, VI, VII and VIII of the alleged Second Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954. Defendant never received a full first premium or any premium at all.

III.

There is nothing due from defendant to plaintiff.

As to the Third Cause of Action

Defendant alleges:

I.

Plaintiff is a citizen of the State of California, and a resident of the Southern Division of the Northern District thereof, and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Denies all and singular the allegations contained in paragraphs II and III of said alleged Third Cause of Action of said Complaint, except that Peter Grant was a resident of Santa Cruz County, California, when he died there August 13, 1954. Defendant never received a full first premium or any premium at all.

III.

There is nothing due from defendant to plaintiff.

Wherefore, defendant Metropolitan Life Insur-

gave his check in payment of the first premium, which Mr. Price accepted and receipted for.

At the time the application was accepted, the money paid and the receipt given, all that remained to be done was the medical examination. This was arranged for, but the day the examination was to be made Grant was killed—his death occurring in the course of his business as a crop duster, and from no other cause.

While Grant's wife was under a doctor's care, the agent, having learned of the death of Grant, and said agent still having the check in his possession, rushed to the home of the Plaintiff, left the check and tried to get her to sign a receipt, which she refused to do. It appears from the evidence that she was in no physical condition to transact any business whatever. I will not comment on this action by the agent except to ignore it as it is not material here.

The facts are simple, as outlined above. This application was accepted by the company as to the business of Grant after over two months of negotiations between the agent and Grant. The money was paid by Grant and there was no way for him to get it back unless the company refused the policy. This they had not done at the time of his death. It is fair to assume that had Grant not met with such untimely death, the defendant insurance company would have insisted that Grant's coverage dated from August 10, 1954, and debited him for his next monthly premium as due September 10, 1954.

I find very little difference in this case and the case of *Ransom vs. Penn. Mut. Life Insurance Company*, (Calif.) 274 P. 2d 633. I hold that the insurance was in force from the date of the payment of the premium.

There is no necessity of going into the rulings on the admissions of evidence which were taken under advisement by the Court at the time of the trial, as they are not material to the decision of this case.

Attorneys for Plaintiff may prepare Findings of Fact, Conclusions of Law, and Judgment, in accordance with the rules of this Court.

[Endorsed]: Filed January 31, 1958.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

* * * * *

1957

Mar. 18—Lodged findings and conclusions (by plttf.)

Mar. 18—Lodged judgment (by plttf.)

Mar. 24—Filed objections of deft. to proposed findings and conclusions by plttf.

* * * * *

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's First Cause of Action having been dismissed prior to trial upon motion of Plaintiff, the above entitled cause came on regularly for trial before the Court upon the allegations contained in the Second and Third causes of action of plaintiff's First Amended Complaint and the defendant's answer thereto, and the Court having duly considered the evidence and being fully advised in the premises, as to Plaintiff's second and third causes of action, finds the following:

Findings of Fact

I.

Plaintiff is a resident of the State of California; defendant is a resident of the State of New York; the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00.

II.

Plaintiff is the widow of Peter Grant and the beneficiary named in the contract of insurance sued upon in this action. Subsequent to the death of Peter Grant, plaintiff married one Gerald P. Kenny and her name now is Margaret L. Kenny. At the trial, plaintiff moved and the Court ordered that the complaint be amended to set forth plaintiff's present name.

III.

At all times herein mentioned prior to August 13, 1954, Peter Grant was a pilot engaged in the business of spraying crops and orchards with insecticide dust by means of an airplane.

IV.

At all times herein mentioned, George I. Price was an agent of the defendant authorized, among other things, to solicit applications for life insurance, to take such applications, to inform the applicant of the premium payable, to request and accept such premiums on behalf of the defendant and to give binder receipts therefor.

V.

Between June 1, 1954, and August 9, 1954, George Price on behalf of defendant solicited Peter Grant for life insurance. In the course of said period of time and in pursuit of said solicitation the defendant fully informed itself of Peter Grant's needs and desires for life insurance and of his occupation and other factors bearing upon his acceptability as an insurance risk and the terms upon which such risk would be assumed by defendant.

VI.

At all times herein mentioned up to and including August 13, 1954, Peter Grant enjoyed excellent health and suffered from no disability, infirmity or ailment.

VII.

On or before August 10, 1954, defendant, at its

head office, authorized and approved Peter Grant for insurance as to the business in which he was engaged.

VIII.

On August 10, 1954, in Watsonville, County of Santa Cruz, State of California, the following facts occurred: George Price solicited Peter Grant to execute, Peter Grant executed, signed and delivered to Price and Price accepted Part A of an application for life insurance (Plaintiff's Exhibit 1 in evidence). George Price computed, solicited from Peter Grant and received and accepted from the latter the sum of \$53.36. George Price executed and delivered to Peter Grant a receipt (plaintiff's Exhibit 2 in evidence). Each of said acts was done by George Price on behalf of and under authority from defendant. The sum of \$53.36 was a full first monthly premium for the contract of life insurance set forth in said application and receipt.

IX.

Plaintiff and Peter Grant and each of them at all times construed the application and the binder receipt as effecting a contract of insurance upon the life of Peter Grant in accordance with the terms set forth in said documents immediately upon signing Part A of said application and delivery of said sum of \$53.36. Said construction was reasonable.

X.

At no time prior to the death of Peter Grant did the defendant perform any act or communicate

an intention to rescind or terminate said contract of insurance.

XI.

In the early morning of August 13, 1954, Peter Grant died solely as the result of an accident while engaged in his occupation hereinbefore mentioned.

XII.

Said contract of insurance provided for the payment by defendant to plaintiff upon the death of Peter Grant of the following sums: (a) the sum of \$100.00 on the date of death of Peter Grant, namely, on August 13, 1954, and a like sum on the same day each and every month thereafter terminating with the monthly payment due immediately prior to the 20th anniversary of said date of death, (making a total of 240 monthly payments of \$100.00 each) and (b) the sum of \$10,000.00 on the twentieth anniversary date of said date of death.

XIII.

Plaintiff made written claim for insurance benefits in connection herewith, which claim was received by Defendant on October 26, 1954.

Conclusions of Law

From the foregoing facts the Court concludes:

I.

The Court has jurisdiction over the parties and the subject matter of this controversy.

II.

On August 10, 1954 a contract of insurance upon

the life of Peter Grant was entered into between Peter Grant and the defendant, said contract was dated August 11, 1954, and was to take effect on said date. The provision in said contract with regard to approval of the risk at the defendant's home office was a condition subsequent; i.e. Peter Grant was insured from the date of the contract subject to the right of the defendant during the life time of the insured to return the premium paid and to communicate its disapproval of the risk and thereby to terminate the contract.

III.

Said contract was in full force and effect on August 13, 1954, the date of Peter Grant's death.

IV.

Plaintiff and Peter Grant have each performed all the terms and conditions of said contract by each agreed to be performed.

V.

Under and by the terms of said contract, defendant is obligated to pay to plaintiff the following sums:

(a) the sum of \$100.00 on the date of death of Peter Grant, namely on August 13, 1954, and a like sum on the same day each and every month thereafter terminating with the monthly payment due immediately prior to the twentieth anniversary of said date of death, (making a total of 240 monthly payments of \$100.00 each), with interest upon the monthly installments due August 13, 1954, Septem-

ber 13, 1954, and October 14, 1954, at the rate of 7% per annum from October 26, 1954, until paid and with interest on all other unpaid monthly installments at the rate of 7% per annum from the date each such installment became due until paid, and

(b) the sum of \$10,000.00 on the twentieth anniversary date of said date of death, and plaintiff shall have judgment in said sums plus her costs of suit.

Let Judgment be entered accordingly.

Dated April 8, 1958.

/s/ CHASE A. CLARK,
U. S. District Judge

[Endorsed]: Filed April 11, 1958.

United States District Court, Northern District
of California, Southern Division

Civil No. 35,022

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COM-
PANY, a New York corporation,
Defendant.

JUDGMENT

The above entitled action came on for trial before the Court without a jury, on June 19, 1957 and

June 20, 1957, the plaintiff appearing in person and by her attorneys, Messrs. Wyckoff, Parker, Boyle & Pope, Philip T. Boyle and Harry F. Brauer of Counsel, and the defendant appearing by its attorneys, Knight, Boland & Riordan, Burton L. Walsh and J. J. Quigley of Counsel, and testimony having been heard and briefs filed by both parties, and the Court having filed its findings of fact, conclusions of law, and order for judgment, and its memorandum opinion herein, now, pursuant to said Order for Judgment, it is hereby

Ordered and Adjudged that the plaintiff Margaret L. Kenny (previously known as Margaret L. Grant) have judgment against the defendant in the following sums: the sum of one hundred dollars (\$100.00) on August 13, 1954, the further sum of one hundred dollars (\$100.00) on the 13th day of each month thereafter terminating with the monthly payment due immediately prior to the twentieth anniversary of said date of death, (making a total of 240 monthly payments of \$100.00 each) with interest upon the monthly installments due August 13, 1954, September 13, 1954, and October 14, 1954, at the rate of 7% per annum from October 26, 1954, until paid, and with interest on all other unpaid monthly installments at the rate of 7% per annum from the date each such installment became due until paid, and the further sum of ten thousand dollars (\$10,000.00) on the twentieth anniversary date of said date of August 13, 1954, and for her costs and disbursements in this action, to be hereafter taxed, on notice, and hereinafter inserted by

the Clerk of this Court in the sum of \$165.64.

Dated April 8, 1958.

/s/ CHASE A. CLARK,
U. S. District Judge

Entered in Civil Docket 4-11-58.

[Endorsed]: Filed April 11, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Metropolitan Life Insurance Company, a corporation, Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled action on the 11th day of April, 1958.

Dated: May 9, 1958.

KNIGHT, BOLAND & RIORDAN,
/s/ BURTON L. WALSH,
Attorneys for Defendant Metropolitan Life Insurance Company

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

Whereas, Metropolitan Life Insurance Company, a corporation, Defendant in the above entitled action has appealed to the United States Court of

Appeals for the Ninth Circuit from a judgment made and entered on the 11th day of June, 1958 against said Defendant in said action, in the said District Court, in favor of the Plaintiff in said action, Margaret L. Kenny, previously known as Margaret L. Grant.

Whereas, the appellant is desirous of staying the execution of the said judgment so appealed from.

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned Metropolitan Life Insurance Company, a New York Corporation, as Principal, and the National Surety Corporation, a Corporation duly organized and existing under the laws of the State of New York, and duly authorized to transact a general surety business in the State of California, as Surety, do hereby acknowledge themselves justly bound in the sum of Ten Thousand and No/100 Dollars (\$10,000.00) jointly and severally, firmly by these presents, to the effect that if for any reason the appeal is dismissed or if the judgment is affirmed, the appellant will pay said judgment in full together with costs, interest and damages for delay, and will pay in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award to the Plaintiff Margaret L. Kenny, her heirs, successors, administrators, successors or assigns.

In Witness Whereof, the corporate name, seal and signature of said Principal is hereto affixed and the corporate name, seal and signature of the said Surety is hereby affixed by its duly authorized

Attorney in Fact at San Francisco, California, this
9th day of May, 1958.

[Seal] METROPOLITAN LIFE INSUR-
ANCE COMPANY,

/s/ By L. J. SCHMOLL,
Third Vice President

[Seal] NATIONAL SURETY CORPORA-
TION,

/s/ By A. C. JOHNSON,
Attorney in Fact

This bond approved this 9th day of May, 1958
and ordered that the same, when filed, shall operate
as a supersedeas for the judgment made and en-
tered in the above cause.

/s/ LOUIS E. GOODMAN,
District Judge

Notary Certificates attached.

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
DOCKETING APPEAL

Good cause appearing therefor,

It is ordered the time for docketing the appeal
herein is extended to and including August 7, 1958.

Dated: June 10th, 1958.

/s/ LOUIS E. GOODMAN,
Chief Judge U. S. District Court

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for the appellant:

Excerpt from Docket Entries.

Petition for Removal from the Superior Court of Santa Cruz County, with copy of Complaint and Summons attached.

Bond on Removal.

Notice by Defendant of Petition for Removal.

Answer of Defendant.

Motion of Plaintiff for Production and Inspection of Records.

Order for Production and Inspection of Records.

Notice by Plaintiff of Motion to File First Amended Complaint.

Order Granting Leave to File First Amended Complaint.

First Amended Complaint.

Answer to First Amended Complaint.

Order of Dismissal of First Cause of Action.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law (lodged by Plaintiff).

Judgment (lodged by Plaintiff).

Objections of Defendant to Findings, Conclusions
and Judgment.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Supersedeas Bond.

Appellant's Designation of Record on Appeal.

Order Extending Time to Docket Record on Ap-
peal.

Reporter's Transcript of Trial Proceedings June
19 and 20, 1957.

Plaintiff's Exhibits: 1, 2, 3, 4, 5 and 6.

Defendant's Exhibits: A, B, C, D, E, F, G and H.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court
this 7th day of August, 1958.

[Seal]

C. W. CALBREATH,

Clerk

/s/ By MARGARET P. BLAIR,

Deputy Clerk

The United States District Court, Northern District
of California, Southern Division

No. 35,022

MARGARET L. GRANT, Plaintiff,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, a New York corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

June 19, 1957

Before: Hon. Chase A. Clark, Judge.

Appearances: For the Plaintiff: Messrs. Wyckoff, Parker, Boyle & Pope, by Philip Boyle, Esq., and Harry F. Brauer, Esq. For the Defendant: Messrs. Knight, Boland & Riordan, by Burton L. Walsh, Esq., and J. J. Quigley. [1*]

The Clerk: Margaret L. Grant vs. Metropolitan Life Insurance Company, for trial.

Mr. Boyle: Ready for the plaintiff.

The Court: You may make your opening statement.

Mr. Brauer: Your Honor, I should like to file and serve a trial brief at this time.

May it please the Court, the issue in this case is whether insurance on the life of Peter Grant was

* Page numbers appearing at top of page of Reporter's Transcript of Record.

in effect on August 13, 1954, when Peter Grant died in an accident.

We intend to show that one George Price was an agent of the defendant Metropolitan Life Insurance Company, authorized among other things to solicit insurance for Peter Grant, to take an application for such life insurance, to inform Peter Grant of the premium to be paid, to solicit and to accept such a premium, and to give a binder receipt therefor.

Now, we intend to show further, your Honor, that Peter Grant was a rather unusual risk for the defendant to take. He was an unusual risk for only one specific reason, namely, because of his occupation. He was a crop dusting pilot.

We intend to show that prior to the time that the application was taken the defendant, Metropolitan Life Insurance Company, had categorically determined that it will accept this aviation risk.

We will show further that on August 10, 1954, after numerous conferences with Mr. and Mrs. Grant, and after [3] numerous consultations with the defendant's home office, George Price took an application for life insurance from Peter Grant. At that time he advised Peter Grant that the first full monthly premium would be \$53.36; that he solicited that amount from Peter Grant, and that Peter Grant paid him a check in that amount, and that Mr. Price at that time gave to Peter Grant a binder receipt therefor.

We intend to show that under existing law a contract of insurance on the life of Peter Grant arose

immediately upon the taking of the signing of that application and the payment of that premium, subject to the right of the defendant Metropolitan Life Insurance Company to terminate that contract if and when it subsequently became persuaded that it would not approve that risk.

We will show that by the time the obligations of the parties became fixed by the death of Peter Grant on August 13, 1954, the defendant Metropolitan Life Insurance Company had not determined that it would not accept the risk and had not notified the plaintiff that it rejected the risk.

Lastly, Your Honor, we contend that under existing law, specifically the Ransom case which we discussed in some detail in the brief we just filed, the medical insurability of the applicant at the time of the application is not a condition precedent to coverage—to insurance coverage.

Nevertheless, however, just to protect us in the event [4] the Court may construe the cases on that point differently from the way we do, we intend to show that Peter Grant at the time the application was taken and at all times from then to the time of his death, was in fact in sound health and was a standard insurable risk.

Thank you, Your Honor.

Mr. Walsh: If Your Honor please, the complaint against the Metropolitan Life Insurance Company is based on three causes of action, the first of which the plaintiff has voluntarily dismissed.

That leaves remaining the two causes of action

whereby the plaintiff claims that although there was an uncompleted application for insurance, nevertheless the Company is bound to pay some \$34,000.00 over a period of time.

The complaint sets forth a part of the application, only a small part of it, and it also attaches to it a photostatic copy of a receipt that was given by the soliciting agent at the time payment was made on account of the premium.

The plaintiff's cause of action is predicated upon a written contract as attached to the complaint.

The fact of the matter is that there is no case in California holding that you can have a contract of insurance until the application is at least fully completed, the medical examination had, the full first premium received by the company at its home office, together with the completed application. [5]

Now, in this case the evidence will show that part A, which is one of several parts of the application, was partially completed, signed by the applicant. It was an application for what is called a whole life family income policy, meaning, briefly, that for a period of 20 years, or during a period of 20 years, there is a decreasing term, so that if the insured should die during the first 20 years, there would be a payment of so much per month per thousand of insurance to the beneficiary. At the end of the 20-year term, there would be a lump sum payment.

Now, it is quite plain from even the portion of the application that the plaintiff has attached to her complaint, and from the receipt, that there are

certain conditions precedent that must be complied with by the applicant before the Company can even consider the application. And one of the most important ones is, of course, that he submit himself to the Company's examining physician for a medical examination, and then the application is sent to the home office, which in this case would be the San Francisco office of the Metropolitan.

The evidence will show and the surviving spouse of the insured—I mean the applicant, testified that she knew that a medical examination was required, and she herself went to the doctor's office and made an appointment for his examination by the examining physician. She made the appointment for 3:30 p.m., Friday the 13th of August, 1954. That morning at about 8:00 o'clock her husband, who was a crop duster, had an [6] accident in his airplane and he died.

So there was no medical examination, there was no completed application, and under the law where an application by an applicant is required to be submitted and is considered as an offer to the company, there was no offer ever made to the company to issue any policy of insurance.

I think the case is very clear-cut. There is a dispute, or will be, apparently, a dispute as to what was said by the agent with regard to the premium. The evidence will show that, in fact, the first premium was not the full premium. That, of course, is also one of the conditions precedent, that before a policy can be issued the full first premium must be paid.

The position of the Metropolitan in this case is a very simple one, Your Honor: There was no offer ever made to the Metropolitan for the issuance of this life insurance. The applicant himself did not comply with the conditions precedent to the approval of an application or the issuance of a policy.

It involves what the courts sometimes call "conditional receipts". This is not a case of a binding receipt. The receipt for the premium simply states, and it shows from the plaintiff's pleading, that there was received on account a certain sum of money.

So I think the evidence will show, Your Honor, that there was never even an offer by the applicant for insurance. And there is, I am quite sure, no evidence that the Company ever [7] approved any sort of a plan for this insurance before the soliciting agent wrote the first part of the application.

In fact, in the application, over the signature of the applicant, there is a definite limitation of the authority of the agent, and so the applicant, of course, was aware of the authority.

Thank you.

The Court: There is just one question in this case, and that is whether the insurance was in force at the time of death?

Mr. Walsh: That is right.

The Court: Call your first witness.

Mr. Boyle: The plaintiff will call Mr. George Price.

GEORGE PRICE

called by the plaintiff as an adverse witness, being first duly sworn, testified as follows:

The Clerk: Please state your name and occupation to the Court.

The Witness: George Price, Agent, Metropolitan Life Insurance Company in Watsonville.

Mr. Boyle: Your Honor, may counsel address a question to Mr. Walsh?

The Court: Yes.

Mr. Boyle: May we have the application in your possession, [8] Mr. Walsh?

Mr. Walsh: Yes, certainly. There is the application dated August 11, 1954. Is that the one you are requesting, Mr. Boyle?

Mr. Boyle: Yes. Will you hand me all parts of this, please, Mr. Walsh, that you have in your possession? It seems to me there are portions here removed from the bottom?

Mr. Walsh: There is a little strip here at the bottom that apparently came loose, either while it was in my possession or somewhere.

Direct Examination

By Mr. Boyle: Q. Mr. Price, how long have you been an agent for the Metropolitan Life Insurance Company? A. Going on 23 years.

Q. And how long have you been a resident of Watsonville, California?

A. Same length of time.

Q. In other words, during the past 23 years, then, you have been engaged as an agent for the

(Testimony of George Price.)

Metropolitan Life Insurance Company in Watsonville, California, and vicinity, is that true?

A. Yes.

Mr. Boyle: Your Honor, may we have permission to question this witness, cross-examine him, under Rule 43 as an adverse and hostile witness.

The Court: You may do so. [9]

Mr. Boyle: Q. Now, during that 23 years, Mr. Price, did you engage in any other occupation, other than the soliciting and selling of insurance for the Metropolitan Life Insurance Company?

A. No.

Q. And during that 23 years were you employed by any other company, other than Metropolitan Life Insurance Company? A. No.

Q. Now, referring to the date August 10, 1954, did you on that date know Peter Grant?

A. Acquaintance, yes.

Q. On that date, August 10, 1954, did you see Peter Grant? A. Yes.

Q. And where did you see him?

A. At his home.

Q. Where was his home?

A. On Sudden Street.

Q. In Watsonville, California? A. Yes.

Q. About what time of day did you see him on August 10, 1954?

A. At that time, to the best of my recollection it must have been approximately 7:30 in the evening.

Q. Was anyone else present when you saw Peter

(Testimony of George Price.)

Grant? A. Mrs. Grant was present.

Q. And Mrs. Grant is the plaintiff in this action, Mr. Price? [10] A. Yes, sir.

Q. Now, at that time did you have a conversation with Mr. Grant about an application for life insurance with the Metropolitan Life Insurance Company? A. Yes.

Q. And did you on that occasion have with you an official form of the Metropolitan Life Insurance Company for an application for life insurance?

A. Yes.

Mr. Boyle: Your Honor please, if we may have these papers marked for identification?

The Court: They may be marked.

Mr. Boyle: There are two papers, Your Honor. Possibly they should be attached and marked as one exhibit.

The Court: Yes, attach the one that has come loose and make it one exhibit.

(Application for life insurance marked Plaintiff's Exhibit 1 for identification.)

Mr. Boyle: Q. Mr. Price, I will show you what is marked Plaintiff's Exhibit 1 for identification. Will you please hold that document, study it carefully as I address the next questions to you.

On August 10, 1954, in the presence of Margaret Grant, did you address to Peter Grant the questions in Part A—— A. Yes. [11]

Q. ——of Plaintiff's Exhibit 1 for identification? A. Yes.

(Testimony of George Price.)

Q. And did Peter Grant answer those questions? A. Yes.

Q. And did you write his answers to the questions put by you on the face of Part A——

A. Yes.

Q. ——in your own handwriting?

A. Yes.

Q. That is, paying close attention to Part A, above the date and place of the application there are certain words, figures, numbers, marks and letters in ink. Were all of those words, figures, marks and numbers placed on Part A of the application by you in your own handwriting?

A. My own handwriting.

Q. Now, referring again to Part A of the application, three lines from the bottom where the printing begins “Sign by applicant” and “Dated at”, is the word “Watsonville” in your handwriting? A. Yes.

Q. And following the number 11, is that in your handwriting? A. Yes.

Q. And the word “August”, is that in your handwriting? A. Right.

Mr. Walsh: What part was that? [12]

Mr. Boyle: “August”.

Q. And similarly, the date “1954” is in your handwriting? A. Right.

Q. Is the signature “George Price” opposite the printed words “Witness to signature” your signature? A. Yes.

Q. Did you place your signature as a witness

(Testimony of George Price.)

at that place after Peter Grant had signed the application? A. Yes.

Q. Did you request Peter Grant to sign the application? A. I asked him to.

Q. Did he sign it in your presence?

A. He did.

Q. Having signed Part A of the application, did you request a sum of money from Peter Grant?

A. A tentative amount, yes.

Mr. Boyle: May we have the answer stricken as non-responsive, Your Honor?

The Court: It may be stricken.

Mr. Boyle: Will the reporter please restate the question to the witness?

(Question read by the reporter.)

A. Yes.

Mr. Boyle: Q. And what was the sum of money that you requested? [13] A. \$53.36.

Q. And did Peter Grant on that occasion give you a check in the sum of \$53.36 payable to the Metropolitan Life Insurance Company?

A. When?

Q. On August 10, 1954.

A. Not for that date.

Mr. Boyle: Will the reporter read the question to the witness?

(Question read by the reporter.)

A. He did.

Mr. Boyle: Q. What was the date on that check?

A. The date of that check was marked, to the best of my recollection, August 11th.

(Testimony of George Price.)

Q. The same date as Part A of the application, is that right?

A. Yes, but he asked me—may I go on?

Mr. Walsh: You have answered the question.

Mr. Boyle: Simply answer the question, Mr. Price.

The Court: Yes. Your attorney will have an opportunity to have you explain these matters.

The Witness: I see.

Mr. Boyle: Q. Now, having received that check from Peter—withdraw the question.

Was the check drawn on the Bank of America, National Trust & Savings Association, Watsonville, California? [14] A. Yes, sir.

Q. Now, having received that check from Mr. Grant, did you then issue him a receipt?

A. For the amount of money, yes.

Mr. Boyle: Your Honor please, may we—oh, pardon me, Mr. Walsh, I thought you had seen this (handing document to counsel).

Your Honor, if we may have this marked for identification?

The Court: It may be marked.

(Receipt marked Plaintiff's Exhibit 2 for identification.)

Mr. Boyle: Q. I will show you Plaintiff's Exhibit 2 for identification, Mr. Price. Is that the receipt that you gave to Peter Grant on August 10, 1954? A. Yes.

Q. Is all of the handwriting matter on that printed receipt in your own handwriting?

(Testimony of George Price.)

A. Yes.

Mr. Walsh: Just a moment. Do you mean on the front or on the back?

Mr. Boyle: On the face of the receipt.

The Witness: On the face of the receipt, yes.

Mr. Boyle: Q. Now, referring back, Mr. Price, to Plaintiff's Exhibit 1 for identification, there is on the back of that document, I believe, a portion entitled "Report of Inspection". Do you have it before you? [15]

A. I have it right before me.

Q. Now, in respect to that section, were all of the numerals, words, marks in ink placed by you in that portion of the application? A. Yes.

Q. And similarly, did you sign that portion of the application, "George I. Price, Agent"? .

A. Yes.

Q. And similarly, at the bottom under the section entitled "Policy to be issued to the credit of", the matters in ink in that portion were written by you in your handwriting? A. Yes.

Q. And that likewise was done in Mr. Grant's presence on August 10, 1954? A. Yes.

Q. Now, attached to the application is a portion which apparently was torn off. There are two sections entitled "To be completed by agent". Have you found it? A. Right here.

Q. There are certain words, figures and numbers written there in those two sections in ink. Were they written in by you in your own hand-

(Testimony of George Price.)

writing on August 10, 1954, when you talked with Mr. Grant? A. Yes.

Mr. Boyle: Now, may I see the original exhibit, please? [16]

Your Honor, we will offer Plaintiff's Exhibit 1 for identification in evidence.

Mr. Walsh: You are offering it in evidence?

Mr. Boyle: Yes.

The Court: It may be admitted.

Mr. Boyle: And we will at this time offer Plaintiff's Exhibit 2 in evidence.

The Court: It may be admitted.

(Documents previously marked Plaintiff's Exhibit 1 and 2 for identification admitted into evidence.)

[See page 13.]

Mr. Boyle: May I address an inquiry to counsel for the defendant, Your Honor?

The Court: You may.

Mr. Boyle: Mr. Walsh, there are in our files, produced by you, two other forms, one relating to armed service status, Form 0365WR. Do you have that in your possession?

Mr. Walsh: Yes, I have.

Mr. Boyle: May we have it?

May we have this document marked for identification, Your Honor?

The Court: It may be marked.

(Document entitled "Armed Service Status" marked Plaintiff's Exhibit 3 for identification.)

Mr. Boyle: Q. Mr. Price, I show you Plaintiff's

(Testimony of George Price.)

Exhibit 3 for identification. In addition to the printed material on [17] the paper, there are certain words, letters and marks in ink above the date. Now, on August 10, 1954, did you write those words, figures, marks and letters in your own handwriting on that document? A. Yes.

Q. Was the information written by you obtained by questioning Mr. Peter Grant? A. Yes.

Q. And the various answers or marks indicated were Peter Grant's responses to those questions?

A. Yes.

Q. Now, similarly, was material "Dated at Watsonville" in ink, "this 11th" in ink, "August—" Aug., an abbreviation,—and "1954" written by you in your handwriting? A. Yes.

Q. Did Peter Grant sign Plaintiff's Exhibit 3 in your presence on August 10th? A. Yes.

Q. And did you then sign your name as a witness? A. Yes.

Mr. Boyle: We will offer the document, Your Honor.

The Court: It may be admitted.

(Document previously marked Plaintiff's Exhibit 3 for identification admitted into evidence.)

Mr. Boyle: Again, may I address counsel for the defense, [18] Your Honor?

The Court: Yes.

Mr. Boyle: Mr. Walsh, similarly we have a document "Life Inquiry, Account No. 30-A" in our possession. Do you have the original?

(Testimony of George Price.)

Mr. Walsh: What is the date of that?

Mr. Boyle: There doesn't seem to be a date on the photostatic copy.

Mr. Walsh: Is this the one?

Mr. Boyle: Yes. May I have this document marked for identification, Your Honor?

The Court: It may be marked.

(Document entitled "Life Inquiry" marked Plaintiff's Exhibit 4 for identification.)

Mr. Boyle: Q. Mr. Price, I will show you Plaintiff's Exhibit 4 for identification. In addition to the printed material on that document there are written words, letters, numbers and figures. Were those words, numbers, letters and figures written in by you? A. Printed in by me.

Q. And were they printed in your handwriting on August 10, 1954?

A. Not at that date. Not at the same date, because we usually complete these forms after the application is obtained at home. [19]

Q. Was that form completed on August 11, 1954?

A. I would say approximately that date.

Mr. Boyle: We will offer Plaintiff's Exhibit 4 for identification.

Pardon me, Your Honor, is Plaintiff's Exhibit 3 for identification in?

The Clerk: Yes.

Mr. Boyle: We will offer the document, Your Honor.

The Court: It may be admitted.

(Testimony of George Price.)

(Thereupon document marked Plaintiff's Exhibit 3 for identification was admitted into evidence.)

Mr. Boyle: Q. Now, Mr. Price, after Mr. Grant signed Part A of the application, gave you his check, and you gave him a receipt, did you take the application with you? A. Yes.

Q. And you left the receipt with Peter Grant?

A. Yes.

Q. Did the application ever return to Peter Grant's possession? A. No.

Mr. Boyle: Now, if I may have Exhibit 1, Mr. Clerk?

Q. I will show you Plaintiff's Exhibit 1, Mr. Price, and I will refer you specifically to the section numbered 16, "Plan of insurance desired", in ink the following letters and abbreviations appear: "W. L. Fam. Inc." Will you tell me what the letters W.L. stand for? [20] A. Whole life.

Q. And will you tell me what the abbreviation "Fam. Inc" means? A. Family income.

Q. Will you state what benefit, if any, was to be payable under the Whole life provision of this application?

Mr. Walsh: Pardon me, may I have that question?

(Question read by the reporter.)

(Colloquy off the record.)

Mr. Boyle: Q. Would you like the question re-read, Mr. Price? A. No.

Q. All right.

(Testimony of George Price.)

A. "Whole Life" is the determination of the type of insurance. "Family income"——

Q. (Interposing). Mr. Price, the question was limited to the benefit, if any, payable under the Whole Life provision, the amount.

Mr. Walsh: Well, Your Honor please, I think that would call for a rather long answer if——

The Court: (Interposing) There is no dispute about it, is there?

Mr. Walsh: If all the provisions of a policy, if a policy had been issued upon the plan applied for, of course it would be a policy with a lot of provisions, and I doubt very much if anyone could tell what it is or what those are from memory. [21]

Mr. Boyle: Your Honor, I will withdraw the question and reframe it.

Mr. Boyle: Q. What was the amount of the "Whole Life" aspect of the policy?

Mr. Walsh: If Your Honor please, I object to that because the application in writing speaks for itself.

The Court: Yes, I think that's true. The only reason why the objection will be sustained is, I think it is very clear the policy is in evidence.

Mr. Walsh: Very well, Your Honor.

Mr. Boyle: Q. Now, referring to the "Family income" provision, what was the amount of the family income provision?

Mr. Walsh: I object to that on the ground that the application doesn't show the amount.

(Testimony of George Price.)

The Court: I will let him answer.

The Witness: Basically, the family income referred to is receiving an income of \$10.00 a month for each \$1,000.00 of insurance purchased.

Mr. Boyle: Q. For what period of time?

A. For a duration, from the date of the application to the end of 20 years.

Mr. Boyle: Thank you. May counsel confer, Your Honor?

The Court: Yes.

The Witness: I beg your pardon, I haven't completed your answer. [22]

Mr. Boyle: Q. Please do so, Mr. Price.

A. If Mr. Grant lived five years, there would be a difference of 15 years under the family income provision paid his widow.

Mr. Boyle: Q. That is, Mr. Price, that the family income provision is depreciable over a period of 20 years? A. Correct.

Q. In other words, at the end of one year there is but 19 years? A. Right.

Q. It is term insurance, isn't it?

A. That is term insurance, that part of it.

Mr. Boyle: No further questions at this time, Your Honor. We may wish to recall Mr. Price.

The Court: Do you have any questions?

Mr. Walsh: You wanted to recall Mr. Price later?

Mr. Boyle: We may, Mr. Walsh. I am not quite sure. It depends on how the evidence evolves.

(Testimony of George Price.)

Cross Examination

By Mr. Walsh: Q. I would like to ask a few questions. Mr. Price, I show you Plaintiff's Exhibit No. 1, which consists of a printed form of application to Metropolitan Life Insurance Company, consisting of Part A, Part B, Part C, and another part that is not numbered.

A. D, medical.

Q. You were asked if on August 10, 1954, you wrote in the [23] answers to certain questions on Part A of this application. Did you first ask Mr. Grant the questions? A. Yes.

Q. And then the answers that you wrote down were true and correct answers to the questions that you asked him, were they?

A. According to his statement, it was written down as he gave them to me.

Q. That is the questions that you had to ask him, he gave you the answers orally and you correctly put those answers in this application, Part A, in your own handwriting, is that correct?

A. Yes, sir.

Q. And then after that was done you had him read it over, did you?

A. He was present and he was able to see everything that was written as I wrote it down.

Q. In other words, as you were asking those questions, you had that application before you so that he could see actually what you wrote on there, is that correct?

A. He was sitting to my left.

(Testimony of George Price.)

Q. Yes, and he could see what you wrote?

A. He could see everything.

Q. After that had been filled in, then he signed it, did he? A. Yes, sir.

Q. Then you signed as a witness?

A. As a witness. [24]

Q. This little slip that is attached here, now attached to Part B of the application, actually—down at the bottom it is perforated, isn't it?

A. Yes.

Q. That strip that is now attached to Part B of the application at that time was attached to the lower part of A and B of the application, is that correct? A. Yes.

Q. You are indicating right across the bottom?

A. That is right, to the left.

Q. I call your attention to Part A of the application up at the top. In printing it says "Medical" does it not?

A. It says "Medical", yes, sir.

Q. That is on Part A? A. Part A.

Q. And Part B—the B is in large type as the A is on Part A, and this is a four-page sheet of the pamphlet type, is that correct?

A. Yes, sir.

Q. And that is always kept intact, is that correct? A. Yes, sir.

Q. It is never torn in two? A. Never.

Q. I call your attention to Part B, which also in printing says at the top, "Application to the Metropolitan Life [25] Insurance Company, Ordi-

(Testimony of George Price.)

nary Department” and below that, “Applicant’s statements to the medical examiner”. Is that correct? A. Yes, that is correct.

Q. On Part B of the application there is a long list of questions. Above that it says, “The spaces below are for the applicant’s answers only. Nothing but his answers should be inserted. Statements of or comments by medical examiner must be recorded in Part C.”

Now, referring again to Part B, are there any answers to any of those questions?

Mr. Boyle: Your Honor, I interpose the objection that the document itself is the best evidence.

The Court: I think that is right. I will let him answer.

The Witness: Are you speaking as far as the agent is concerned?

Mr. Walsh: I will withdraw the question.

Q. Do you know what the purpose of Part B of the application is? A. Medical.

Mr. Boyle: Objection, Your Honor. It calls for the conclusion of the witness.

The Court: Well, it does, but this being a court trial I will permit his answer to stand.

Mr. Walsh: Q. I will show you Plaintiff’s Exhibit No. 2 [26] and I want to point out something that counsel for the plaintiff did not, and that is that on this receipt, down in the left-hand corner, it says, “Appointment for medical examination.” Now, is that your handwriting in there?

(Testimony of George Price.)

A. Yes, sir.

Q. What does it say?

A. It says, "Not Thursday."

Q. What else does it say?

A. Dr. Blaisdell.

Q. What else does it say?

A. It says "The first small office".

Q. Did you have a conversation with Mr. Grant the night of August 10th at his home in Mrs. Grant's presence with respect to that part of the receipt?

A. Yes, sir.

Q. Who is Dr. Blaisdell?

A. Our examining doctor in Watsonville, at 850 Main Street.

Q. What did you say to Mr. Grant with respect to Dr. Blaisdell?

A. I asked Mr. Grant if he could possibly go up Wednesday. He said he was very busy, couldn't make it.

Q. Pardon me just a moment. We are back in 1954. Wednesday was what day of the week?

A. To the best of my recollection, three years ago I think Wednesday was August 11th.

Mr. Walsh: I think the Court will take judicial notice [27] of the dates, but if I may refresh the Court's recollection, I have here a 1954 calendar—(showing to counsel).

Mr. Boyle: There is no question about it.

Mr. Walsh: This might be of assistance to all of us. We are talking about the month of August, 1954.

(Testimony of George Price.)

The Witness: Yes, sir.

Mr. Walsh: Q. August 10th, according to this calendar, was a Tuesday. A. Right.

Q. August 11th Wednesday, August 12th Thursday, and the 13th was a Friday. Now, as I understand your testimony, this application, the receipt and the check were all dated August 11th, although they were actually executed the evening of August 10th. A. Yes, sir.

Q. Which was a Tuesday, is that correct?

A. Right.

Q. May I ask why they were all dated August 11th?

A. We make out a cash sheet every day. For that Tuesday our cash sheet was closed. We are supposed to account for that money or any moneys on the date we collect it, and the only day I could put that money in was the next day. I mean, ordinarily.

Q. Was there any other reason? Did either Mr. or Mrs. Grant ask you to hold the check? [28]

A. They asked me to hold the check for a few days.

Q. And you did? A. Yes, sir.

Q. And therefore you dated the application——

A. On a business day.

Q. A day ahead, August 11th?

A. Yes, sir.

Q. Although they were actually signed——

A. On the evening of the 10th, approximately 7:30 or 8:00.

(Testimony of George Price.)

Q. Getting back to the receipt, Exhibit No. 2—it might make it a little clearer, Your Honor, if I explain a little what this shows. It says, “Received from Peter Grant, Fifty-Three and 36 one-hundredths dollars on account of application made this day to the Metropolitan Life Insurance Company. If the sum collected at the time Part A of this application is signed is at least equal to the full first premium on the policy applied for, and if such application is approved at the Company’s home office for the class plan, and amount of insurance therein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from this date.”

Then there is further language, and down in the left-hand corner is this part I am talking about of an appointment for medical examination, and written in in Mr. Price’s handwriting is, “First small office, Date not Thursday,” and below that [29] “Dr. Blaisdell”.

This was down in Watsonville, wasn’t it?

A. Yes.

Q. Again calling your attention to that notation on the receipt about Dr. Blaisdell, what on the night of August 10, 1954, did you tell Mr. Grant with respect to Dr. Blaisdell?

A. I explained to Mr. Grant that our examining doctor was Dr. Blaisdell and suggested that inasmuch as he was working when he was called upon to do so, depending upon flying conditions and so forth, that he make his own appointment.

(Testimony of George Price.)

Q. You suggested to Mr. Grant——

A. That is right, because I couldn't—I couldn't get any definite time from him as far as the time would be permissible for him to see the doctor.

Q. This application that you had at that time, Plaintiff's Exhibit No. 1, a pamphlet of four pages, when you were filling that out, you had that open, did you? A. Yes.

Q. Did you by any means make Mr. Grant aware that it was required that he have a medical examination?

Mr. Boyle: I object to that as leading, Your Honor.

The Witness: Yes, sir.

Mr. Boyle: I move to strike the answer.

The Court: This being a court matter, I will let the answer stand subject to your objection. [30]

The Witness: May I speak further?

Mr. Boyle: May it please Your Honor, it has been apparent, even on the direct examination of this witness, that he was attempting to anticipate a defense to this thing, and similarly Mr. Walsh's questions have been so framed. I like to be liberal and attempt not to interfere with a counsel's cross-examination of the witness, but I must at this point, Mr. Walsh, inform you that I will stop and make objections for the record if this proceeds further.

Mr. Walsh: I would like to respond to that, if Your Honor please, and state——

The Court: Well——

(Testimony of George Price.)

Mr. Walsh: I will submit it then.

The Court: I will let him answer subject to your objection, and I will strike it — I will not be prejudiced in any way by any testimony here that I think an objection should be sustained to. What is the question here that you have asked?

(Question read.)

The Court: The answer may be stricken. He may state what the conversation was, but in that form I will strike the answer.

Mr. Walsh: Q. What was the conversation with respect to medical examination, if any, at that time?

Mr. Boyle: Your Honor, again may I interpose one other objection, which will be made several times, I anticipate, [31] during the course of this proceeding. If Your Honor will read carefully the entire Part A of the receipt, it is very apparent that a written contract was made of some kind at that time. Now, this offer, I take it, is for the purpose of introducing oral evidence, not to explain the circumstances, but to vary the wording of the contract made. There is nothing said in the receipt about taking a medical examination as a condition — nothing in that receipt at all. It is not incorporated into the contract as a condition precedent. I take it that the purpose of this is that Mr. Price will say, "I told him he didn't have any insurance." But, you see, that flies in the face of the receipt that was issued. We will object to the question on the ground that it violates the extrinsic evidence

(Testimony of George Price.)

rule, that it is an attempt to vary a written contract by parole evidence.

Mr. Walsh: That is a strange thing coming from counsel because their own case is predicated not upon the receipt, not upon the true application, Your Honor. If you will look at Exhibit A attached to plaintiff's amended complaint, you will find that they base their cause of action upon a written contract, which consists of only Part A of the application and this receipt. Now, in variance of their allegations, they are introducing into evidence an entirely different thing, and now they want to preclude me from asking about it. They put them in evidence and then they object to my bringing to [32] the attention of the Court what these documents show and what transpired. He asked about the conversation on the night of August 10th and I am entitled to go into the entire conversation, and contrary to counsel's ground for objection, I would like to call the Court's attention to Part A of the application, which, by the way, they plead as their contract, that the statements and answers in Part A and in Part B of the application for this insurance shall form the basis of the contract of insurance if one be issued. It is certainly material to this case whether Part B was ever executed at all. And yet he wants us to be precluded from pursuing that line of inquiry. That is one of the bases upon which they are suing us. If it is the plaintiff's position that they want to stand on the contract that they pleaded, I will be very glad to move for

(Testimony of George Price.)

dismissal because they have not proved any contract whatsoever.

Mr. Boyle: May it please Your Honor, it is very apparent why we have offered this entire document, to prove the agency and the scope of his authority. Note, for instance, on the back of this document, "Please read instructions carefully before you write the application," and then follows the instructions to the agent. Similarly the other documents we have introduced indicate the general authority and scope of this man's agency for the Metropolitan.

The Witness: Your Honor——

Mr. Walsh: As far as the agency is concerned, I would like [33] to call Your Honor's attention to this Part A over the signature of the applicant: "No agent, medical examiner or any other person except the President, Vice-President, Actuaries, Treasurers, or Secretaries of the Company has power on behalf of the Company to make, modify or discharge any contract of insurance or bind the Company by making any promises respecting any benefits under any policies issued hereunder. No statements made to or by and no knowledge on the part of any agent, medical examiner or any other person as to any facts pertaining to the application shall be considered as having been brought to or brought to the knowledge of the Company unless stated in either Part A or Part B of the application for its insurance."

The applicant had knowledge of the limitation of the authority of the agent. The cases on that are

(Testimony of George Price.)

numerous, and hold that when an applicant signs an application he knows then of the limitation of the agent. He is bound by that. This man is a soliciting agent, and the scope of his agency is strictly limited, and is brought to the attention of the applicant by reason of the fact that he signs it.

The Court: It is time for the morning recess. I will take a recess for 15 minutes.

(Recess.)

The Court: The witness may return to the stand.

(The witness, George Price, resumed the witness stand.) [34]

Cross Examination—(Continued)

The Court: The objection will be sustained. By this ruling I am not saying that I will not hear you on this question again when you put on your defense.

Mr. Walsh: Very well.

Q. Now, Mr. Price, I will again show you Exhibit A, the original application, and you were asked under "Report of Inspection" if you wrote those things in there that appear in handwriting?

A. Yes, sir.

Q. And that has to do—may I have it for a moment—that has to do with questions such as "Where was the application written?" "Give information available as to amount and source of applicant's annual income," the race, height, weight, and so forth.

Mr. Boyle: Pardon me, Mr. Walsh, I cannot fol-

(Testimony of George Price.)

low that in my copy. Oh, pardon me, I have the wrong one.

Mr. Walsh: Q. Well, you were asked about that by counsel. I will ask you where you obtained the answers, obtained that information that you put in there in that part of the application.

A. After Part A was filled in, the face of the application, then I wrote the report of inspection afterwards, after that.

Q. From whom did you obtain the information you put in there under "Report of Inspection"?

A. From Mr. Grant.

Q. I see. Question 8 of Part A of the application is "Occupation and duties". You wrote in answer to that question of two parts, Occupation A and B is "Duties", and it appears here his occupation was crop duster, and duties "Dusting crops by plane."

That information that you wrote in there you obtained from Mr. Grant at that time on August 10th in his home? A. Yes, sir.

Q. Now, this Exhibit No. 2 of the plaintiff's, the receipt with the part for appointment for medical examination, was that attached to this exhibit No. 1, the application?

A. Yes, the lower part from left to right.

Q. That was attached to the lower left part of Part A of the application? A. Yes, sir.

Mr. Walsh: In view of Your Honor's ruling, I should like to call Your Honor's attention to the

(Testimony of George Price.)

provisions of Exhibits 1 and 2. As I mentioned, it is in pamphlet form.

Q. Mr. Price, the only parts that were detached are those things such as this receipt which was in the lower left-hand corner of Part A?

A. Correct. Perforated.

Q. And this strip that has become detached since then, adjoined that, did it? [36] A. Yes, sir.

Mr. Walsh: And that was on there. And I may say, Your Honor, that that became detached after it was in my possession, except the receipt.

Now, calling Your Honor's attention to the application, in large letters "Part A, Part B". Part B, in printing in large type, at the top just like in Part A it says, "Application to the Metropolitan Life Insurance Company." And below that in parentheses "Ordinary Department".

Below that it says "Applicant's statement to the Medical Examiner". Below that, "The spaces below are for the applicant's answers only. Nothing but his answers should be inserted. Statements of or comments by medical examiner must be recorded in Part C."

Below that is a long list of questions such as "Are you now in good health and able to carry out your full duties?" 2—and ten there are several parts to that: "When were you last sick? Month, year, name of doctor, nature of sickness, doctor's diagnosis if you had a doctor, how much time have you lost from school or work in the past five years on account of bad health," and so on, and then a

(Testimony of George Price.)

long list of specific questions going to specific ailments and diseases.

And down at the bottom is printed, "I have read the foregoing answers before signing. They have been correctly written as given by me and are true and complete. There are [37] no exceptions to any such answers other than as stated herein."

"Dated this day of," and so forth. "Signature of applicant". "Witness to signature, M.D."

That apparently calls for the signature of the applicant and the signature is witnessed by the M.D.

And then Part C, the medical examiner's report on, and it says, "Insert full name of applicant".

Examination must be made in private. No agent or other field representative to be present to see or report. Your findings and opinion, whether favorable or unfavorable, should never be discussed with the applicant or any other person. Upon completion of your report, forward immediately to the Company's home office, ordinary department.

"If examination is refused, please return the uncompleted form to the District Manager stating particulars." "The matter of delicacy or doubt affecting a risk, or if you have facts or impressions not covered in your report, write directly to the medical division and attach your letter securely to this report. Be sure to enter the applicant's name on any supplementary report.

(Testimony of George Price.)

“When in doubt as to how impairment should be recorded, see Company’s booklet ‘Instructions to Medical Examiners’”.

“Measure applicant’s height, chest and abdomen. Weigh the applicant on an accurate scale whenever possible. However, this must be done if the amount applied for is over \$10,000.00 [38] (over \$5,000.00 on the family income or endowment plan).”

And I call Your Honor’s attention to Part A where the amount of insurance applied for is \$10,000.00, and the plan is Whole Life Family Income.

Then going on from Part C, there are a number of things for the medical examiner to fill out, including height, weight, and so forth, and other findings.

Now, again I wish to call Your Honor’s attention to the fact that over the signature of the applicant dated August 11, 1954, it says, “The foregoing statements and answers are true and complete. It is agreed, (1) the statements and answers to Part A and Part B of this application for this insurance shall form the basis of a contract of insurance if one be issued.”

And then the limitations on the authority of the agent which I have previously read.

Then, still reading from the application, “The Company shall incur no liability under this application until a policy has been delivered and the full first premiums specified in the policy has actually been paid to and accepted by the Company during the lifetime and continued insurability of the ap-

(Testimony of George Price.)

plicant, in which case such policy shall be deemed to have taken effect as of the date of issuance as recited herein, except as follows:

“If an amount equal to full first premium on the [39] policy applied for is paid to and accepted by the Company at the time Part A of this application is signed, and if this application is approved at the Company’s home office for the class, plan and amount of insurance herein applied for, then the insurance in accordance with the terms of policy applied for shall be in force from the date hereof.”

The receipt states that the \$53.36 is on account of the application. There is no statement in there that there is a full first premium.

Question 23 of Part A of the application. 23-A: “What amount has been paid in advance on account of the first premium?” There is written in “\$53.36”. There is nothing anywhere in the written documents that states that the full first premium was paid.

Mr. Boyle: Pardon me, Your Honor. If Mr. Walsh wants to argue this case at this time, I am quite well prepared. I fail to see what the purpose of this discussion is. I know I will well answer his statements.

The Court: All right. There is nothing for the Court to rule on right at this time.

Mr. Boyle: Thank you.

Mr. Walsh: Q. Mr. Price, what did you do with the application after the night of August 10th?

Mr. Boyle: Your Honor, I believe that is beyond

(Testimony of George Price.)

the scope of the direct examination. I will accordingly object. Mr. [40] Price testified that he took the application with him.

The Court: I think I will make the same ruling on that. The objection will be sustained, but not to preclude you from putting on your defense.

Mr. Walsh: Very well, Your Honor.

Q. Mr. Price, you received a check for \$53.36, you testified, on the night of August 10th but it was dated August 11th. What reason was given for post-dating the check?

A. He asked me to hold the check for a few days, that he expected some money to deposit.

Q. What did you do with the check?

A. I held it as he had asked me to.

Q. What ultimate disposition did you make of it? A. Finally——

Mr. Boyle: Objection, Your Honor; beyond the scope of the direct examination.

The Court: Objection will be sustained.

Mr. Walsh: Very well. No further questions.

Mr. Boyle: A few questions, Your Honor.

Redirect Examination

By Mr. Boyle: Q. Mr. Price, on the evening of August 10 Mrs. Grant was sitting at the table with you and Mr. Grant, was she not?

A. Sitting on the chesterfield and behind the coffee table.

Q. Now, when you asked for \$53.36, did Mrs.

(Testimony of George Price.)

Grant move from [41] the coffee table to the dining room table?

A. I just can't recall that.

Q. Did she get out a check book?

A. That I can't recall, either, but I have a faint recollection that she made out the check.

Q. Now, isn't it a fact, Mr. Price, that on that occasion Mrs. Grant took her check book and noted the balance, and either Mrs. Grant or Mr. Grant told you that she would date the check August 11th because on the following day Mr. Grant would secure four or five hundred dollars from his employer and deposit it in the bank on August 11th?

A. To the best of my recollection, I can't recall any such statement.

Q. Then, Mr. Price, on that evening you issued a Company's official receipt for a bad check, is that right?

Mr. Walsh: Just a moment. I think the receipt speaks for itself.

The Court: Yes, it may. I certainly think the premium was paid; that is, the check was paid and he accepted it. Whether it was any good or not, he accepted it and gave a receipt for it.

Mr. Boyle: Now, may I have Exhibit 1?

Q. Referring to that portion of Exhibit 1 entitled "Report of Inspection", I think you have testified in response to a question from counsel that those answers were written in response to questions which you put to Mr. Grant on that [42] occasion. Now, note at the bottom, just above your signature,

(Testimony of George Price.)

“Above is the result of my personal, careful investigation”.

Now, it is a fact, is it not, that you had made such a personal, careful investigation of Mr. Grant, that some of these questions, the answers were written in by you of your personal knowledge, were they not?

A. Are you speaking of the Report of Inspection?

Q. Yes.

A. They were written in after questioning Mr. Grant, because it is all interrogatories.

Q. Well, in Question 5, “Is there anything unfavorable as to applicant’s character, habits or mode of living?”

A. To the best of my knowledge, there wasn’t any.

Q. And as a matter of fact, over the course of a couple of months you had been soliciting Mr. Grant and had made this investigation that the statement says, isn’t that true?

A. I beg your pardon?

Q. You had made this personal, careful investigation that your statement says?

A. I had made no investigation except on Company business. I had not investigated Mr. Grant’s personal character.

Q. And yet you stated in question 5 that his character, habits and mode of living were favorable?

(Testimony of George Price.)

A. That is simply the Company's way of finding out what the agent's observation is. [43]

Q. Well, that was based on your observation?

A. Observation.

Mr. Boyle: That is all. Just one moment, Mr. Price.

Mr. Walsh: No questions.

Mr. Boyle: I have just one more.

Mr. Walsh: Oh, I am sorry.

Mr. Boyle: Q. Mr. Price, again, in the 23 years that you have been doing business for the Metropolitan Life Insurance Company, you have been very careful to follow the Company's instructions, have you not? A. Explicitly.

Q. I call your attention to Exhibit 1, instruction numbered 1. Will you please read it?

A. "The full premium must be obtained in advance when payable monthly, in all cases. It should be obtained whenever possible."

Q. The payment here was payable monthly, was it not, Mr. Price? A. Correct.

Mr. Boyle: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Boyle: I will call Mrs. Kenny.

MARGARET KENNY

the plaintiff herein, called as a witness in her own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your name to the Court.

The Witness: Mrs. Margaret Kenny.

The Clerk: What is your occupation, if any?

The Witness: I am a housewife.

Direct Examination

By Mr. Brauer: Q. You are the plaintiff in this action? A. That is right.

Q. And your present name is Mrs. Kenny?

A. That is right.

Mr. Brauer: I would like to move the Court to amend the complaint to set forth the plaintiff's present name.

The Court: It may be so amended.

Mr. Brauer: Q. You are the widow of Peter Grant, are you? A. Yes, I am.

Q. Did you and Mr. Grant have any children?

A. Yes, we had two boys.

Q. And what are their names?

A. Peter and John.

Q. What are the ages?

A. Fourteen and eight.

Q. Are you remarried now? A. Yes, I am.

Q. When did you remarry?

A. November 10, 1956.

Q. And your husband, what is his name? [45]

A. Gerald P. Kenny.

Q. Where do you reside now?

A. At Davis, California.

(Testimony of Margaret Kenny.)

Q. I call your attention to the month of August, 1954. Where did you reside then?

A. 111 Sudden Street, Watsonville.

Q. How long had you resided at that address prior to August, 1954? A. Two months.

Q. Do you recall approximately when you moved to that address?

A. Around the latter part of May or first part of June.

Q. Of 1954? A. 1954.

Q. How long prior to that had you lived in the vicinity of Watsonville, California?

A. A year and a half.

Q. Now, Mrs. Grant, what was the occupation—pardon me, I am so used to calling you Mrs. Grant that I may keep on doing that. What was the occupation of Peter Grant in 1954?

A. Mr. Grant was a crop duster pilot. He dusted crops and orchards with spray and dust by airplane.

Q. How long had he had that occupation?

A. Since 1951.

Q. Since 1951? A. Yes. [46]

Q. Till the date of his death? A. Yes, sir.

Q. Do you know George Price?

A. Yes, I do.

Q. When did you first meet Mr. Price?

A. Shortly after we moved to Sudden Street.

Q. And that would have been approximately when?

A. First of June, around the first.

(Testimony of Margaret Kenny.)

Q. At the time you had your first meeting with Mr. Price, who was present?

A. Just Mr. Price and myself.

Q. And do you remember what was said on that occasion?

A. Mr. Price came in and introduced himself, said that he was the Metropolitan agent, knowing that we already had a policy with them, and he wanted to introduce himself and let us know who he was and if we wanted any information that we knew where to get hold of him.

Mr. Brauer: Can the Court hear the witness?

The Court: Yes. I don't know whether counsel can.

Mr. Walsh: I can't hear the witness.

The Court: Speak just a little louder.

The Witness: All right.

Mr. Brauer: Q. Was anything else said about that application?

A. No, there was not. [47]

Q. Did you have another conference, another meeting with Mr. Price thereafter?

A. A few days later Mr. Price came.

Q. And where did that conversation take place?

A. On Sudden Street at our home.

Q. Who was present there?

A. Just Mr. Price and myself.

Q. When did that take place, approximately, if you can recall?

A. It is hard to say. I know it was just a few days after the first visit.

(Testimony of Margaret Kenny.)

Q. And the first visit you testified was in the early part of June, 1954?

A. That is right.

Q. What was said on that second occasion?

A. Mr. Price first asked if Mr. Grant was there and I said no, that he was working, and we talked about a number of things. And then we got to the conversation of insurance, and he asked if Mr. Grant was interested in any more insurance, and I said that he had talked about taking it out but that he would have to talk to him about that.

Q. What else was said?

A. I told Mr. Price that I would have Mr. Grant call him or he could call Mr. Grant. I don't know which happened.

Mr. Walsh: If Your Honor please, I think all of this is entirely irrelevant and immaterial. I move that the testimony [48] be stricken.

The Court: I think so.

Mr. Brauer: Your Honor, may I address myself to that point? The purpose of this testimony, of course, is not to vary a written agreement. It is merely to acquaint the Court with the background of the negotiations. I believe the law to be that once the agency of an agent has been established, the negotiations leading up to the business which he transacts are admissible. This line of testimony is also relevant in determining the extent of the investigation which the defendant had made prior to writing the application, and consequently bears on their approval of the risk.

(Testimony of Margaret Kenny.)

The Court: On your objection I ruled out or sustained your objection to the first witness here testifying as to certain conversations that took place.

Mr. Brauer: Your Honor, as I recall the Court sustained our objection as to alleged testimony as to whether a medical examination was required before the application was effected. That testimony would have been in direct conflict with the written contract and it was on that basis that the objection was made. I do not believe the situations are identical.

The Court: I will not rule too strongly on objections here because it is a matter the Court is trying, and if I decide when this case is submitted to me that I should have sustained an objection to any question that I did not sustain [49] I will not consider it. I will let her go ahead and tell her story.

Mr. Brauer: I do not think this line of testimony will take too long, Your Honor.

Mr. Walsh: Do I understand the Court's ruling is this testimony so far be stricken out?

The Court: I will let it in, but I may later strike it as not being relevant to what we are trying here. I am inclined to think that the contract and what was in writing is possibly the ruling factor in this case. I will let her go ahead and tell her story, however.

Mr. Walsh: Thank you.

(Testimony of Margaret Kenny.)

Mr. Brauer: Q. When did you next have a conversation with Mr. Price, if you recall?

A. Mr. Price called up, if I remember right, and made an appointment to see Mr. Grant toward the end of June, but the exact date I don't know.

Q. Were you present at that conversation?

A. Yes.

Q. And who was present at that conversation?

A. Mr. Price, myself and Mr. Grant.

Q. Do you recall what was said?

A. Mr. Grant was very interested in finding out first whether his first policy that he had with the company, whether he was covered under his occupation. [50]

Mr. Walsh: I move that that be stricken as not responsive.

Mr. Brauer: I will concede that is irrelevant, if Your Honor please.

The Court: It may be stricken.

Mr. Brauer: Q. Go on, please.

A. And they talked—Mr. Price asked Mr. Grant if he was interested in any more insurance, and Mr. Grant said he definitely would like to take out a straight life policy, and Mr. Price asked him what amount, and he said \$10,000.00.

Q. Do you recall if anything else was said at that time?

A. Not to my knowledge.

Q. Do you know whether there was any other conference between Mr. Price and your husband during the month of June?

(Testimony of Margaret Kenny.)

A. Well, I never remembered any, but you have showed me a letter in the last day or so that they have that Mr. Price must have had a meeting with Mr. Grant when I was not there.

Q. But you were not present?

A. I don't remember it at all.

Q. When were you next present at a meeting with Mr. Grant and Mr. Price?

A. I believe the middle of July.

Q. The middle of July?

A. The middle of July.

Q. And Mr. Price and your husband and you were present at that time? [51]

A. That is correct.

Q. What was said then?

A. Mr. Price told Mr. Grant, if I remember right, that the company would have to have more information on his flying before they would even consider insuring him, and he took that information, and Mr. Grant signed it.

Mr. Brauer: Counsel, may I have that aviation questionnaire?

Mr. Clerk, will you mark this for identification, please?

(The aviation questionnaire of the Metropolitan Life Insurance Company referred to was thereupon marked Plaintiff's Exhibit 5 for identification.)

Mr. Brauer: Q. Mrs. Grant, I show you a paper entitled "Aviation Questionnaire, Metropolitan Life Insurance Company," which purports to bear the

(Testimony of Margaret Kenny.)

signature of Peter Grant, and ask you whether you recognize that?

A. Yes, that looks like it.

Q. What is that document as you recall?

A. I didn't understand.

Q. Is that the document that was signed by your husband on the occasion around July 15th that you just testified to?

A. Yes, it is.

Q. Who asked those questions that appear?

A. Mr. Price asked Mr. Grant.

Q. Mr. Price asked those questions?

A. Yes. [52]

Mr. Brauer: Your Honor, I will offer this as Plaintiff's next in order.

The Court: It may be admitted.

(Plaintiff's Exhibit 5 for identification was thereupon received in evidence.)

Mr. Brauer: Q. Do you recall whether anything else was said at that meeting on or around July 15, 1954?

A. I believe that they discussed insurance. Mr. Grant wanted a straight life policy so bad, but Mr. Price told him about the insurance for the family protection which he thought would be a better policy.

Q. What was said?

A. Mr. Grant asked Mr. Price what it would run, and Mr. Price said that he would look it up, and he looked it up and the base of the policy was \$400.00 a year for \$10,000.00 life with family protection rider.

(Testimony of Margaret Kenny.)

Q. Did you say \$400.00? A. A year.

Q. Did he say exactly \$400.00?

A. Yes, I believe he did.

Mr. Walsh: Pardon me. Are you still talking about this fourth visit?

Mr. Brauer: Yes, her testimony is with regard to the visit around July 15th.

Mr. Walsh: The middle of July. [53]

Mr. Brauer: The middle of July.

Q. Was anything said at that time with regard to aviation premium?

A. Mr. Price said that he couldn't tell him. He said he would have to check with the company, that he did not have the authorization to tell him what the extra premium would be for his flying, that he would have to write and find out.

Q. Was anything else said at that time that you recall? A. No, there was not.

Q. When was a conversation next had with Mr. Price?

A. It was the first part of August. I would say the 5th or 6th. I went away on Sunday the first to my mother's.

Q. How long did you stay away?

A. I was gone until the afternoon of the 4th, which was a Wednesday.

Q. This took place the first week of August?

A. Yes.

Q. And who was present then?

A. My husband, Mr. Grant, myself and Mr. Price.

(Testimony of Margaret Kenny.)

Q. Where did the conversation take place?

A. At our home.

Q. Were you present during that entire conversation?

A. No, just the first part.

Q. During the time you were present, what was said?

A. Mr. Price walked in the front door—— [54]

Q. Pardon me. Were you present at the early part of the conversation?

A. The first part.

Q. The first part of the conversation. Go ahead, please.

A. They walked in and were standing in the doorway between the dining room and the hall, because I can see it just as plain. Mr. Price handed Peter a document.

Q. When you speak of Peter, to whom are you referring? A. My husband, Pete.

Q. Go ahead.

A. He handed him the document. I don't know what it was. It was a piece of paper, to read. I don't know whether it was a letter or what it was.

Q. What was said?

A. He said that the Company would insure him.

Q. Was anything else said at that time that you recall?

A. Peter asked him how much his aviation extra premium would be based upon the \$400.00 a year for the average man, and he said the company said around \$200.00.

(Testimony of Margaret Kenny.)

Q. That is with the extra aviation premium?

A. That is right.

Q. What else was said, if anything?

A. I went out. They were going into the living room and Pete, I remember asking him if he would figure up what he thought approximately it would be a month. He wanted some idea so that we could make up our mind whether we could [55] afford to take out the insurance or not.

Q. What was done then?

A. That I don't know. I went out. I left.

Q. That is the last that occurred?

A. Yes.

Q. Did your husband say anything at that time as to whether he would or would not take the insurance?

A. Well, I think the money was the big factor. We wanted to be sure we could afford to take it.

Q. At that point you left, is that correct?

A. That is right.

Q. What was your next contact with Mr. Price?

A. Mr. Price called me up and—or I called Mr. Price. I can't remember. To make a date, because Mr. Grant had decided he would take out the policy.

Mr. Walsh: I will ask that that be stricken as a conclusion.

The Court: Yes, it may be stricken.

Mr. Brauer: Q. Will you state the conversation between you and Mr. Price when he telephoned? A. All I know——

(Testimony of Margaret Kenny.)

Mr. Walsh: I object to that on the ground no foundation has been laid.

Mr. Brauer: Q. Did you testify you called Mr. Price or Mr. Price called you? I am sorry. I may not have heard [56] your answer to that question. I asked you what your next contact with Mr. Price was.

A. I said either Mr. Price called me or I called Mr. Price to make a date. I don't remember.

Q. When you say "called"——

A. On the telephone.

Q. What was said at that time?

A. Just to make an appointment to see Mr. Grant about taking out the insurance.

Mr. Walsh: I move that that be stricken as immaterial and having nothing to do with the issues in the case.

The Court: I do not think it is material. I will sustain the objection.

Mr. Brauer: Q. To come back for a minute, Mrs. Grant, to the conversation during the first week in August, you testified that Mr. Price showed a paper to your husband?

A. That is correct.

Q. Did you see that paper?

A. No, I did not.

Q. You did not read it?

A. No, I did not.

Q. You do not know what it said?

A. No, I do not.

(Testimony of Margaret Kenny.)

Q. After this telephone conversation that you talked about, when was the next time that you saw Mr. Price? [57]

A. Mr. Price came to our home on the evening of the 10th.

Q. The 10th of August?

A. That is right.

Q. Who was present then?

A. Just Mr. Price, my husband and myself.

Mr. Walsh: Will you please speak up?

The Witness: I am sorry.

Mr. Brauer: Q. Were you present during that entire conversation?

A. Yes, I was. Is that better?

Mr. Walsh: That is better. Thank you.

Mr. Brauer: Q. What was said at that time?

Mr. Walsh: I object on the ground no proper foundation has been laid.

The Court: She may answer.

Mr. Walsh: No time, place, or persons present.

The Court: I understood the time was fixed.

Mr. Walsh: The only thing was the time.

Mr. Brauer: Q. What time was it, if you recall?

A. I believe it was around 7:00 o'clock.

Q. In the evening? A. In the evening.

Q. And you have testified that Mr. Price and your husband were present?

A. That is right. [58]

Q. During that entire conversation. Now, what was said?

(Testimony of Margaret Kenny.)

A. Well, we went into the living room and Mr. Grant sat across from Mr. Price. He sat on the davenport, I sat to his left, and Mr. Grant sat on a chair across, and Mr. Price got up and handed Pete a paper—I don't know what it was—to read.

Q. What was the format of that paper? Did it look like a letter or what?

A. I thought it was a letter because he said he had gotten this back from the Company and that they would insure him for his business.

Q. Did he show one letter or more letters, if you recall?

A. That I don't know. Only one that I remember.

Q. You just remember seeing one letter being shown to you?

A. That is right.

Q. What else was said at that time?

A. Well, Mr. Price said that he would have to take down the information for the application for the insurance, and he asked him all the questions and Pete answered them and signed the application.

Q. What was done then?

A. Then Mr. Price got out his books and figured out what it would be. He had already figured it out previously, around what he thought it would be a month. He figured it out in his book and it came out to a little bit more than Pete had [59] figured it would be based on what he had said before. So he went over his books again and it was a little bit higher and it came out to \$53.36.

(Testimony of Margaret Kenny.)

Q. What was said in regard to that?

A. Mr. Price said that that was what the monthly payment would be.

Q. Please go on. What was done then?

A. Well, then Pete asked me if I would write him a check for the insurance, and I got out the check book, but we didn't have the balance in our check stub to warrant paying the payment.

Mr. Walsh: Pardon me. I am sorry I didn't hear that.

The Witness: I would have nothing in the balance on our check stub to pay for the payment, and I informed Pete about it, and we asked Mr. Price if he would hold the check one day until we went to Salinas and withdrew the money from the company and put it in the bank.

Q. What did he say to that?

A. Mr. Price said he would be glad to.

Mr. Walsh: Maybe we can stipulate to this. Do you want to stipulate?

Mr. Brauer: Yes, either a stipulation or testimony.

Mr. Walsh: I will stipulate that the bank balance of the Grants on August 10th was \$49.51, and that on August 11th \$490.00 was deposited in the account, that there was sufficient [60] money in the account to cover the check until the account was closed out on August 20, 1954.

Mr. Brauer: Which was after the death of Peter Grant.

(Testimony of Margaret Kenny.)

Mr. Walsh: Yes.

Mr. Brauer: You have no objection to these dates going in?

Mr. Walsh: Just so you wouldn't clutter up the record, that is all. If you want to put it in, I will withdraw the stipulation.

Mr. Brauer: I would like to put them in the record anyway, Your Honor.

Mr. Walsh: I will withdraw the stipulation then.

Mr. Brauer: Very well.

Q. I will show you what purports to be a booklet of check stubs and ask you whose it is.

The Court: I had not noticed the time. We will recess until 2 o'clock.

(Whereupon a recess was taken in these proceedings until 2:00 o'clock p.m. this date.)

Wednesday, June 19, 1957, 2:00 o'clock p.m.

The Court: You may return to the witness stand.

MARGARET KENNY

the plaintiff herein, resumed the stand, being previously duly sworn, testified further as follows:

Mr. Brauer: Your Honor please, if counsel will reinstate his stipulation, it won't be necessary to clutter up the record with these two documents.

Mr. Walsh: Very well.

The Court: The stipulation is reinstated.

Direct Examination—(Continued)

Mr. Brauer: Q. Now, Mrs. Kenny, as I recall

(Testimony of Margaret Kenny.)

it, the last thing you testified to was that you wrote a check in the sum of \$53.36 at the direction of your husband, is that right? A. Yes, I did.

Q. And who signed that check?

A. Mr. Grant did.

Q. What was done with that check then?

A. It was handed to Mr. Price.

Q. To whom was that check payable?

A. Metropolitan Life Insurance.

Q. On what bank was it drawn?

A. Bank of America in Watsonville.

Q. What was done with it then? [62]

A. Mr. Price handed Mr. Grant a receipt for the check.

Mr. Walsh: Pardon me, may I have that answer?

The Witness: A. I said Mr. Grant was handed the receipt for the insurance.

Mr. Brauer: Q. I show you Exhibit 2, in evidence, and ask you whether that is the receipt you are referring to? A. Yes, it is.

Q. That was handed to Mr. Grant by Mr. Price?

A. That is right.

Q. At the time he received the check?

A. Yes.

Q. Was anything said in that meeting with regard to a medical appointment?

A. Yes, Mr. Price told Mr. Grant that he would have to go to Dr. Blaisdale and have his physical examination.

(Testimony of Margaret Kenny.)

Q. What else was said?

A. But that he couldn't go on Thursday because that was Dr. Blaisdale's day off.

Q. Was anything said about the benefits that are payable under the application then taken in the event of death?

A. Well, Mr. Grant kidded with Mr. Price and said, "Well, what would happen if I should die the first year the policy is in force?" He said, "What would be the benefits paid to my family?" Mr. Price said, "Well, it would be \$100 a month for 20 years and at the end of 20 years your wife would get a [63] lump sum of \$10,000."

Q. Was anything said at that time as to when coverage was to be effective?

A. No, he didn't say either way.

Q. Was anything else said that you recall?

A. Not to my knowledge.

Q. Now, what was done with regard to the premium payment on the next day, August 11th?

A. We had told Mr. Price when we gave him the check that Mr. Grant would go to Salinas, to the home office, and draw out enough to cover the check and have it in the bank the next day, that we would have it in by 3:00 o'clock in the afternoon before the bank closed, and as soon as Mr. Grant was through flying he went to Salinas and obtained——

Q. (Interposing) What time approximately was it he went?

A. I would imagine just after 11:00 o'clock.

(Testimony of Margaret Kenny.)

The Court: That is already stipulated to.

Mr. Walsh: I ask it be stricken.

The Court: It is stipulated to.

The Witness: A. He went to Salinas and drew a check from our account.

Mr. Walsh: I ask that that be stricken as non-responsive to a question.

Mr. Brauer: Well, in the light of the stipulation I think we need not pursue this. [64]

Mr. Brauer: Q. Did you do anything with regard to a medical appointment for your husband?

A. Yes. On Thursday I had to take our son up, spent all day in the same building——

Q. Pardon me, I didn't hear you, I'm sorry.

A. On Thursday, which was the 12th, I had an appointment in the same building as Dr. Blaisdale for my oldest boy, and I was there all day, and while I was there I went to the desk and made an appointment for Mr. Grant for Friday. They couldn't take him until 3:30 that afternoon, which would be the 13th.

Q. Will you state what happened on August 13th?

A. Well, I got up in the morning and made his breakfast, and he left about 6:00 o'clock in the morning for work. And I usually went to bed, but I stayed up that morning and did my housework, and both the children were in bed; and at 8:30 in the morning Dr. Bell called from the hospital and just plainly stated that Pete had died.

And with that I collapsed. They came and took

(Testimony of Margaret Kenny.)

the children away and got sedatives from the doctor for me.

Mr. Brauer: (Handing document to Mr. Walsh.)

Mr. Walsh: I don't see any necessity of the death certificate. We will stipulate that, pursuant to request of counsel previously made, as of October 26th, of 1954 receipt of due proof of death under the previously existing policy was received by the company, and on the same day a claim was made by the [65] plaintiff, through her attorneys, for insurance under this application.

The Court: Is that sufficient?

Mr. Brauer: With regard to that stipulation I would ask if counsel would further stipulate that he nor anybody else on behalf of the defendant has ever made any objection to the manner or timeliness of the proof of claim.

Mr. Walsh: What is that again?

Mr. Brauer: That neither you nor anybody else on behalf of defendant has at any time made an objection as to the manner or the timeliness of the proof of loss and notice of death.

Mr. Walsh: Well, there is no issue as to that.

Mr. Brauer: No, no issue.

Mr. Walsh: I would say this, that there would be nothing in a policy, if issued upon the plan, the premium, the class of insurance applied for——

The Court: As I remember your answer, you denied that.

Mr. Walsh: Yes, it is denied, Your Honor.

(Testimony of Margaret Kenny.)

The Court: In your answer you deny that they made due proof.

Mr. Walsh: Well, I will stipulate, as I already have, that we received notice of their making a claim; and we stipulate to the date of death as August 13th, 1954.

And I think, counsel, so we may have the record clear, also stipulate that he was engaged in his occupation as a crop [66] duster at the time of his death.

Mr. Brauer: Your Honor please, I accept that stipulation. My purpose for wishing to introduce the certified copy of the death certificate, which is admissible under California law as prima facie evidence of all the facts therein recited, is primarily to show the cause of death.

The Court: Well, he has admitted the cause of death, as I understand it.

Mr. Brauer: As being an accident.

Mr. Walsh: That is not an issue here.

Mr. Brauer: All right.

Mr. Walsh: It would have been an issue if—well, that wouldn't have been an issue anyhow, even in the First Cause of Action. That is dismissed.

Mr. Brauer: I would still like to introduce it.

Mr. Walsh: All right, I will withdraw the stipulation.

The Court: You may introduce it.

Mr. Boyle: What stipulation are you withdrawing? The one of notice of due proof of loss?

(Testimony of Margaret Kenny.)

Mr. Walsh: I am trying to save the record.

Mr. Brauer: This has nothing to do, counsel, with question of proof of loss, the death certificate.

Mr. Walsh: Well, what is the point to the death certificate?

Mr. Brauer: Cause of death, basically, as being an [67] accident rather than sickness.

Mr. Walsh: That part of the death certificate is not admissible in evidence, whether it was accidental, suicide or homicide.

Mr. Brauer: I beg to differ with you, counsel. I have authorities to that effect. It is prima facie evidence, subject to being rebutted, but it is prima facie evidence as to all the facts therein recited.

Mr. Walsh: That is not correct. The statute of California, Health and Safety Code, Section 10155, says that a certified copy of death certificate is admissible in evidence as prima facie evidence of the facts stated therein; and in this state it has been held that that part of the death certificate which says whether or not the death was caused by accident, suicide or homicide not a fact because it's a conclusion by the coroner.

The Court: Oh, aren't we chasing shadows here? As I understand what he has agreed to stipulate, it is to save you the necessity of proving that on October 25th, 1954, the Metropolitan Life Insurance Company received a policy and due proof that the insured, Peter Grant, died on August 13th, 1954. He admits that. Do you have anything else you want to prove in regard to that?

(Testimony of Margaret Kenny.)

Mr. Brauer: No. I think no issue has been made as to suicide or——

Mr. Walsh: (Interposing) If he wants to go ahead and take [68] up the time of the Court proving things, I am not going to make any stipulation, Your Honor.

The Court: Well, I think that is all that is necessary.

Mr. Boyle: One more fact, that the death was accidental.

The Court: I guess there is no question about that.

Mr. Brauer: No issue has been made as to that, Your Honor.

The Court: Well, I understood that.

Mr. Walsh: In the absence of putting further evidence in the record which is the only evidence now before the Court, I will stipulate that on October 25th, 1954, the Metropolitan received a written claim for insurance under this application, along with due proof of death under policy number 20158526-A, which was the subject of the First Cause of Action which has been dismissed.

I don't think it's material whether death is accidental or by accidental means or suicide or homicide or anything else.

Mr. Brauer: All right.

The Court: Well, you say under the First Cause of Action. That is repeated in the Second and Third Cause of Action also.

Mr. Walsh: Not the first. The only matters be-

(Testimony of Margaret Kenny.)

fore the Court now, Your Honor, are the Second and Third Causes of Action.

The Court: Yes, I know, but that's a part of the allegations in the Second and Third Causes of Action also, as I understand it.

Mr. Brauer: As to accidental death? [69]

The Court: No, as to the proof having been made.

Mr. Brauer: Well, there is a stipulation to that effect.

Mr. Walsh: I am admitting that we received notice of the claim. I am not standing upon any defense that because claim was not made they are not entitled to bring this suit.

The Court: Then that should be sufficient.

Mr. Brauer: All right.

Mr. Brauer: Q. When did you next see Mr. Price, Mrs. Kenny?

A. I couldn't tell you the exact date, but Mr. Price came in the morning of the 14th, the day after Pete's death. I know it was early and the house was full of people, all the relatives and everybody was there, and I was under sedatives.

He came in with another man, but I don't know who he was. I don't remember, only that there was another man with him. And he asked me—he walked over to me and told me he was sorry to hear about Pete's death, and handed me a check. He said, "I never put it in the bank. I never deposited it." He said, "So the insurance is not in force."

He said, "Do you have the receipt?" Well, I

(Testimony of Margaret Kenny.)

didn't know where anything was. I told him I didn't know where it was, and he said, "Well, would you sign these papers?" And I said, "I don't want to sign anything."

He said, "Well, if you will sign these we will advance you money," and I said, "but I don't want to sign anything," and with that he left. [70]

Q. Mrs. Kenny, calling your attention to approximately June 8th, 1954, do you know whether or not that date your husband took a physical examination?

Mr. Walsh: What date was that?

Mr. Brauer: June 8th, approximately, 1954.

A. Yes, he did. He had to take a CAA physical.

Q. A what? A. A CAA.

Mr. Walsh: Just a moment. I think that is entirely irrelevant, Your Honor please, to any of the issues here. The question is, have we got a contract or haven't we.

Mr. Brauer: Your Honor, my reason for going into this line of testimony is, as I indicated in my opening statement, on reading the cases I am not completely sure that the insurability, the medical insurability of the applicant at the time of death is not relevant, and I wish to establish through this and other witnesses that he was in fact insurable in the event the Court concludes that it is a relevant matter.

Mr. Walsh: I am going to object to that, Your Honor, because that would open wide a long line of inquiry that could go on endlessly.

(Testimony of Margaret Kenny.)

The fact of the matter is, here the documents show the man did not have a physical examination that was required by the company, and if the purpose of this is an attempt on the part of the plaintiff to introduce evidence of other doctor's [71] opinions, in the first place it is entirely irrelevant and, in the second place, as I say, it would open an avenue of inquiry that might go on endlessly.

The Court: Well, I think anyone would presume he was in good health unless there is a showing to the contrary. I don't see any necessity of going into it, but this being a Court trial, however, if you feel it is material, I will let you present it and rule on its admissibility later.

Mr. Brauer: Thank you, Your Honor.

Mr. Brauer: Q. Do you know whether between June 8th, 1954, and the date of his death Peter Grant was ill?

A. Yes, he had complained of what we thought was the flu. He had a stomach ache, and flu was going around, and I called my doctor's nurse, which was Dr. Northrup, and she had a prescription filled at the drug store for him. It only lasted one day, and he took that medicine and that was that.

Q. Approximately when did that occur?

A. Oh, I think it was around the first part of July.

Q. Aside from that incident did, to the best of your knowledge, your husband ever visit any physician between June 8th, 1954 and the date of his death?

(Testimony of Margaret Kenny.)

Mr. Walsh: I think that is immaterial, Your Honor, for the same reason as stated before.

The Court: I will let him answer. Same ruling.

A. Not to my knowledge. [72]

Mr. Brauer: Do you know of your own knowledge whether or not your husband was in good health on August 10th, 1954?

A. Yes, he was.

Mr. Walsh: Pardon me, what was that question, Mr. Brauer?

Mr. Brauer: Q. Do you know of your own knowledge whether or not Peter Grant was in good health on August 10th, 1954?

A. Yes, he was.

Q. On August 11th? A. Yes.

Q. On August 12th? A. Yes.

Mr. Walsh: August 10th was——

Mr. Brauer: The first question, and then I asked as to August 11th.

Mr. Brauer: Q. What was the answer with regard to August 11th? A. Yes.

Q. On August 12th? A. Yes.

Q. On August 13th? A. Yes, he was.

Mr. Brauer: Pardon me a moment, Your Honor. That is all I have of this witness, Your Honor.

Your Honor please, I have a witness here who is a physician brought here from Watsonville. If it meets with the agreement [73] of Counsel and the Court, I would like to put him on at this time.

The Court: Well, I have always felt in a case

where there is a doctor in attendance we should permit him to testify so we can return him.

You may step down, and you may call your doctor.

(Witness excused.)

ANTONE J. SAMBUCK

called as a witness for the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name for the record.

A. Antone James Sambuck.

Direct Examination

Mr. Brauer: What is your occupation, Dr. Sambuck? A. Physician and surgeon.

Q. Where do you practice?

A. I practice in Watsonville, practiced there from 1919 to 1923, and left Watsonville in 1923 and came back—was in Los Angeles and came back in 1934 and have been there since.

Q. Since 1934 in Watsonville, is that right?

A. Yes.

Q. Now, as part of your medical duties are you currently a medical examiner for the Civil Aeronautics Administration in Watsonville?

A. Yes. [74]

Q. Were you that during the year 1954?

A. Yes.

Q. Calling your attention to June 8th, 1954, did you on that date make a medical examination of Peter Grant on behalf of the Civil Aeronautics Ad-

(Testimony of Antone J. Sambuck.)

ministration? A. Yes, I did.

Q. And did you write down the results of that examination on a particular form? A. Yes.

Q. What form is that?

A. A Civil Aeronautics form.

Q. At what time did you make the notations on that form? A. At what time?

Q. Yes. When did you do it?

A. The date, you mean? The date or the time of day?

Q. Well, in relation to the time you examined Mr. Grant, when did you make these notations on that form?

A. 6/8/54, in the afternoon when he came to see me.

Q. In other words, at the time he was there to see you? A. Yes.

Mr. Walsh: June 8th, 1954? A. Yes, sir.

Mr. Brauer: Q. Will you describe generally, Doctor, what that examination consisted of?

A. Well, it consisted of a complete physical examination. [75]

Q. Now, as part of that examination did you have occasion to evaluate, to examine his head, face, neck and skull? A. Yes, sir.

Q. And nose? A. Yes, sir.

Q. Sinuses? A. Yes, sir.

Q. Mouth and throat? A. Yes, sir.

Q. Ears? A. Yes, sir.

Q. Eyes? A. Yes, sir.

Q. Lungs and chest? A. Yes, sir.

(Testimony of Antone J. Sambuck.)

Q. Heart? A. Yes, sir.

Q. Vascular system? A. Yes, sir.

Q. Abdomen and viscera? A. Yes.

Q. Anus and rectum? A. Yes.

Q. Endocrine system? A. Yes. [76]

Q. G.U. system? A. Yes.

Q. The extremities? A. Yes.

Q. The spine? A. Yes, sir.

Q. The skin? A. Yes, sir.

Q. Did you have occasion to give a neurological examination? A. Yes.

Q. And a psychiatric examination?

A. Yes, sir.

Q. Did you take his blood pressure?

A. Yes, sir.

Q. Did you determine what his weight was?

A. 224 pounds.

Q. Did you determine his height?

A. 73 inches.

Q. Doctor, at the moment I am merely asking you what you did rather than your specific findings.

A. Pardon me?

Q. I said, at the moment I am just asking you the extent of the examination rather than your specific findings. I am just asking you whether you took these measurements.

A. I see. Pardon me. [77]

Mr. Walsh: Pardon me, what did you say his height was? A. 73 inches.

Mr. Walsh: 73 inches? A. Yes.

(Testimony of Antone J. Sambuck.)

Mr. Brauer: Q. Now, did you have occasion to take a medical history?

A. During our examinations we always do. We ask questions if they had any serious illnesses, serious diseases, any surgery. We always do ask those questions.

Mr. Brauer: Can the Court hear the witness?

The Court: Yes, go ahead.

Mr. Brauer: Q. Now, you say that you always do. Did you in this instance take a medical history of Peter Grant? A. Yes.

Q. After making this examination, will you state what those findings were with regard to the health of Peter Grant at that time?

Mr. Walsh: Just a moment.

Mr. Brauer: Q. Based on your examination?

Mr. Walsh: I think that is immaterial, Your Honor, as to what the condition of his health was on June 8th, 1954.

The Court: I will make the same ruling I have made on the admission of other testimony. I will let it in and I will rule on its admissibility later.

Mr. Brauer: Q. You may answer the question.

A. I found him in good physical health.

Q. Did you note any deficiencies whatever in his physical condition?

A. None whatsoever.

Q. Did you after examining Peter Grant at that time issue to him a medical certificate for insurance? A. Yes, I did. [79]

(Testimony of Antone J. Sambuck.)

Mr. Walsh: I think that's immaterial as to how that was done.

The Court: You may have it marked, admitted with the same ruling.

Mr. Brauer: Let me ask the witness, is that your signature appearing on this document?

A. Yes.

Q. And did you give that to Peter Grant?

A. Yes, sir.

Mr. Brauer: I will offer this as Plaintiff's next in order.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Document received in evidence and marked Plaintiff's Exhibit 6.)

Mr. Brauer: Q. Dr. Sambuck, are you presently a medical examiner for any life insurance company? A. I am.

Q. For which company?

A. Franklin and the Beneficial.

Q. And were you a medical examiner for life insurance companies around June, 1954?

A. I believe so.

Q. How long have you done work as a medical examiner for life insurance companies?

A. Well, I have been doing examinations for different insurance companies ever since I practiced medicine. [80]

Q. Now and as such, you have had occasion, have you not, to determine the medical acceptability of an applicant for life insurance. Now, based on your examination of Peter Grant, on June 8th, and

(Testimony of Antone J. Sambuck.)

on your experience as a life insurance medical examiner, do you have an opinion as to whether Peter Grant was, on June 8, 1954 a medically standard insurance risk? A. Yes.

Mr. Walsh: Just a moment, please. I ask that that answer be stricken, because the question is not involved here as to whether on June 8th of 1954 this man, this applicant would have been eligible, and furthermore, the hypothetical question does not take into consideration all the facts and issues in the case; and for the further reason that it is anticipating something that is not in evidence.

The Court: I will let him answer this question. Just yes or no.

A. Yes, sir, I do.

Mr. Brauer: Q. The question was merely whether you had an opinion.

The Court: That's right, let him answer.

A. Yes, sir.

Mr. Brauer: Q. Will you state your opinion?

A. In other words, if I had examined him for an insurance company, I would have passed him. I would have okayed him.

Mr. Brauer: Now, may I have Exhibit 1, please?

Q. Dr. Sambuck, I show you Exhibit 1 in evidence and call your attention to parts B and C thereof and ask you whether you, at my request, have, during the past few days, looked at an exact copy of that part B and C?

A. I didn't get your—

Mr. Walsh: Just a moment, please.

(Testimony of Antone J. Sambuck.)

Mr. Brauer: May I proceed, counsel?

Mr. Walsh: If Your Honor please, I would like to move to strike out the opinion this doctor has given upon the grounds stated. As I understand your ruling, it was he could state whether or not he had an opinion.

The Court: Yes, that's right.

Mr. Walsh: Now I ask that the opinion that he gave in response to the next question be stricken, because obviously it does not relate to the time of the application and was an answer to the question that calls for his conclusion, and did not include the facts involved in this case.

The Court: I will reserve my ruling on that until I take the full case.

Mr. Brauer: Q. In connection, Your Honor, with counsel's first point, namely, that this does not relate to the date involved here,—

The Court: I have already ruled on it.

Mr. Brauer: All right, Your Honor.

Q. Did you at my request during the last few days study an [82] exact copy of parts B and C of that Exhibit 1? A. Yes, sir, I did.

Q. Now, based on your examination of June 8th of Peter Grant, are you in a position to answer each question set forth on parts B and C of Exhibit 1, as of June 8, 1954?

A. Yes, I am.

Q. Now, based on your examination of June 8, 1954, if you were asked to fill out parts B and C, would you note anywhere thereon any medical in-

(Testimony of Antone J. Sambuck.)

formation inconsistent with Peter Grant's being a standard medical risk?

Mr. Walsh: Just a moment. I will object to that, because obviously any number of things may have happened between June 6th or 8th of 1954 and August 10th of 1954, and I don't think any honest witness, medical or otherwise, could testify or answer truthfully that question except by saying "No." Incompetent, irrelevant and immaterial.

Mr. Brauer: I think Your Honor understands my question. I asked only——

The Court: Just a moment.

Mr. Brauer: Excuse me, Your Honor.

The Court: I have my doubts about this, but I am going to admit it in evidence, and I will not be prejudiced by it in any way if I decided, as likely, not to consider it. You may answer.

Mr. Brauer: As counsel misunderstood the question, [83] perhaps the witness would too.

Mr. Brauer: Q. I am asking you as to whether as of June 8, 1954, you would note any derogatory information on parts B and C. A. No.

Q. What is your answer? A. No.

Mr. Walsh: I will object to that, Your Honor, because we are not concerned with June 8th; it is entirely irrelevant.

The Court: I will make the same ruling. I want to be somewhat liberal about letting some testimony in, and I feel that the objection should be sustained. I wouldn't consider it if this wasn't a court trial, but it is before the court anyway, and I will not be

(Testimony of Antone J. Sambuck.)

prejudiced by it if I decide the objection is well taken.

Mr. Brauer: Your Honor, my position——

The Court: You may answer.

Mr. Brauer: He has answered, Your Honor.

The Court: Let the answer stand.

Mr. Brauer: That is all I have of this witness, Your Honor. If I may, I would like to address the Court for a second as to the relevancy of this part.

The Court: I don't think there is any necessity of doing it, because I am going to hear from you later on in these matters. [84]

Mr. Brauer: Your Honor——

The Court: I wouldn't rule anything out without giving you an opportunity.

Mr. Brauer: Very well, Your Honor. Your witness, counsel.

The Court: You may cross examine, and any cross examination that you have in connection with matters that the Court has ruled on will be also stricken if I sustain the original objection.

Cross Examination

Mr. Walsh: Q. Doctor, when you examined Mr. Grant on June 8th, was it, of 1954? A. Yes.

Q. You said he weighed 224 pounds?

A. Yes, sir.

Q. And his height you said was 73 inches. I take it that would be six feet one inch, is that right?

The Court: Do you want a pencil and paper?

(Testimony of Antone J. Sambuck.)

A. 73 inches? Six feet three. No, six feet one, that's right.

Mr. Walsh: Q. His height was six feet one inch on June 8th? A. That's right.

Q. Was that with his clothes on, with his shoes on? A. That was with his shoes off.

Q. That was in his bare feet? A. Yes, sir.

Q. Six feet one inch. And when you weighed him, did he have [85] any clothes on?

A. He just had his underwear on, that's all.

Mr. Brauer: Sorry, I can't hear.

Mr. Walsh: Q. Just underwear?

A. Shorts.

Q. Shorts? A. Shorts and uppers.

Q. For all practical purposes, you would call that stripped weight, wouldn't you?

A. That's right.

Q. Did you see him after June 8th?

A. No, I haven't.

Q. Did you take a urinalysis?

A. Yes, sir.

Q. What other insurance companies did you say you were an examining physician for?

A. Franklin and Beneficial.

Q. In 1954? A. Franklin.

Q. What?

A. Franklin and Beneficial.

Q. Franklin what?

A. Franklin Life Insurance.

Q. Franklin Life Insurance Company?

A. Yes. [86]

(Testimony of Antone J. Sambuck.)

Q. And what's the other one?

A. Beneficial.

Q. Beneficial what?

A. Life Insurance Company.

Q. Do you know of your own knowledge what the weight requirements are for various classifications of the Metropolitan?

A. The Metropolitan? No.

Q. And you didn't know that in 1954?

A. No.

Q. So you could not tell in 1954, or now, could you, whether on account of weight and height, this man would qualify for insurance under the Metropolitan Life Insurance requirements?

A. I know nothing about Metropolitan life insurance requirements, no.

Q. You wouldn't know that? A. No.

Q. Now, there is a place in there, in part C of this Exhibit 1, where it says, "Height in shoes," is that correct? That's question No. 7 of part C.

A. Mmm-hmm, yes, sir.

Q. "Height in shoes." What does it say about weight there?

A. "Weight indoors, see instruction 5 above." I mean,—

Q. Does it ask there, Doctor, that the examining physician weigh the applicant? [87]

A. Yes, sir: "Did you weigh the applicant?"

Q. All right. Now, if you were the examining physician for the Metropolitan Life Insurance Company in 1954, you put in his height and his weight,

(Testimony of Antone J. Sambuck.)

you wouldn't know whether this application would be approved by the company, would you?

A. No, I wouldn't.

Mr. Walsh: That's all, Doctor.

Redirect Examination

Mr. Brauer: Q. Dr. Sambuck, will you take a look at your CAA examination form, please, and will you look at Item 55 and tell me what it says there?

A. "Build." Says "Heavy." I put down "Heavy."

Q. What other categories?

A. "Slender, medium, heavy, obese."

Q. Which one did you note as being applicable?

A. Heavy.

Q. Heavy. Do you recall how Peter Grant's weight was distributed?

A. It was well distributed; he was a muscular type. He was not an obese type.

Mr. Brauer: That's all.

Mr. Walsh: I move, if Your Honor please,—well, I will reserve that motion.

The Court: All right, the doctor will be excused?

Mr. Brauer: He may be as far as I am concerned. [88]

Mr. Walsh: Yes, certainly.

The Court: You are excused, then. The other witness may return to the stand.

(Witness excused.)

The Court: If you wish to, you may move up here while you are cross examining.

Mr. Walsh: Thank you. Are you through?

Mr. Boyle: Mr. Walsh, I wonder if you could speak a bit more clearly too? I can't hear you sometimes over here.

Mr. Walsh: I am sorry. I will try my best to talk up, and I hope the witness will too.

MARGARET KENNY

the plaintiff, recalled as a witness in her own behalf, having been previously duly sworn, testified as follows:

Cross Examination

Mr. Walsh: Q. Mrs. Kenny, is it now?

A. That's right.

Q. How soon after Peter Grant died did you leave Watsonville?

A. Mr. Grant died on August the 13th, 1954, and I lived there until March of 1956.

Q. And where did you move to then?

A. Davis, California.

Q. You have been living there ever since, have you? A. That's right.

Q. On November 20, 1956, you remarried? [89]

A. November 10th.

Q. November 10th? A. That's right.

Q. All right. November 10, 1956. You are happily married now? A. Very happily.

Q. During the conversation at your home at 111 Sudden Street in Watsonville on August 10th of 1954, there was no representation made to you by Mr. Price as to when any insurance would take

(Testimony of Margaret Kenny.)

effect pursuant to the application which is now in issue in this court, was there? A. No.

Q. As a matter of fact, Mr. Price never made any representation at any time that you know of as to when insurance would take effect pursuant to this application, is that correct?

A. No, we assumed.

Q. What's that?

A. I assumed that it was in effect when we paid the premium.

Q. Maybe I can refresh your recollection. Your deposition was taken on March 28, 1956, and I call your attention to page 80 and ask you to read lines 1 to 4, please.

A. I read the question and answer?

Q. Will you read it to yourself, please, and I will ask you a question.

The Court: Just read it to yourself.

Mr. Walsh: Q. Have you read it? [90]

A. Yes.

Q. Thank you. Reading from the deposition of Margaret L. Grant taken March 28, 1956, line 1 to 4, page 80:

"Q. There was no representation made at that time on August 10th by Mr. Price or at any other time as to when this insurance would become effective? "A. No."

Do you recall that question?

A. Yes, I do.

Q. And you recall giving that answer?

A. Yes, I do.

(Testimony of Margaret Kenny.)

Q. Is that your testimony now? A. Yes.

Q. On this same occasion, August 10th, did you hear Mr. Price tell Peter Grant that he had to have a medical examination for this insurance?

A. Yes, I did.

Q. And that he was to go and see Dr. Blaisdell, is that correct?

A. That's correct.

Q. And you yourself, I believe, testified that you went to Dr. Blaisdell's office and made an appointment for your husband to be examined for this insurance, and you made the appointment for him to see Dr. Blaisdell on August 13th of 1954 at 3:30 [91] p.m., is that correct?

A. That's correct.

Q. And you made that appointment on Thursday, the 12th of August?

A. That's correct.

Q. And before Peter Grant went to Dr. Blaisdell for the medical examination for this insurance, he died? A. That's correct.

Q. I believe that you testified that Mr. Price came out to your home at 111 Sudden Street in Watsonville about six times up to and including August 10th, is that correct?

A. That's correct.

Q. Do you recall that in your deposition you said that he came there five times up to and including August 10th of 1956?

A. Yes, I did, but I didn't know that he had

(Testimony of Margaret Kenny.)

been there at one previous time when I was not at home. You had letters that the——

Q. Pardon me? You don't know what?

A. There was one meeting between Mr. Price and Mr. Grant that I did not know about until two days ago. You had the letters on your desk at the deposition and I never saw them.

Q. Well, then, your recollection at the time your deposition was taken was, or your testimony in your deposition was, based upon your recollection, is that it?

A. Of the meetings that I attended, yes.

Q. Yes. And subsequently you have seen some correspondence, [92] is that correct?

A. That's right.

Q. And after reading that correspondence, that has refreshed your recollection, shall we say?

A. Yes.

Q. Now, what was this occasion that makes the sixth visit, and what was it that refreshed your recollection?

A. It was the fifth visit.

Q. Fifth?

A. The fourth visit, it must have been; because there was a letter that Mr. Price got back that I was shown.

Q. Is that the letter that you requested your attorneys to get a copy of from the Metropolitan Life Insurance Company before you filed this suit?

A. It is the application for a trial application, is the one I am speaking of.

(Testimony of Margaret Kenny.)

Q. What was the date of it?

A. I didn't pay any attention to it. It was in June, the end of June.

Q. It was a letter and you have read it?

A. I read the trial application, which was taken at that meeting, which I did not attend.

Q. And that fixes in your mind, then, another occasion that Mr. Grant called before August 10th?

A. In the end of June, yes. [93]

Q. The end of June? A. Yes.

Q. And that had something to do with a trial application, is that it?

A. That's what it said, yes.

Q. As a matter of fact, Mrs. Grant—Mrs. Kenny, pardon me—you didn't ever know that Mr. Grant had requested a trial application of the Metropolitan, did you? A. I did not.

Q. So this is knowledge you have acquired since this suit was filed? A. That's right.

Q. Now, that trial application—pardon me. I believe you testified that from the inception, that Mr. Grant wanted \$10,000 in insurance all the time, is that right? A. Yes, he did.

Q. However, the trial application was for \$5,000?

A. I know nothing about that.

Q. Well, will you identify that letter, then, so I can find out what it is you are talking about?

A. I am talking about the \$5,000 trial application that Mr. Grant made with Mr. Price. I don't know why he made it; the only conversations that

(Testimony of Margaret Kenny.)

I remember was that it was always \$10,000 that he wanted in insurance.

Q. I see. So there were some things that went on between Mr. [94] Grant and Mr. Price that you didn't know about that you have learned about subsequently? A. That's right.

Q. And it is true, isn't it, that there were conversations between Mr. Price and Mr. Grant that you did not know about? A. That's right.

Q. In fact, on one of the occasions of Mr. Price's visit to Mr. Grant, you were actually only there about ten minutes of the time, weren't you?

A. That's right.

Q. And you took a walk somewhere?

A. I went out of the house; I don't know where I went.

Q. And you didn't know where you went, and you didn't know whether or not you took the children with you; you didn't know whether you went to a neighbor's house and you didn't know much about anything of what you did, did you?

A. I just know that I was not there in the house.

Q. As a matter of fact, Mrs. Price,—pardon me—Mrs. Kenny—you did not understand much about these premiums or anything, did you?

A. I understood what the policy was Mr. Grant took out for the first year. I couldn't explain to you what the depreciation of the yearly family income was at all. I only know what Mr. Price told Mr. Grant on the 10th.

Q. All right. I will read from page 79 of the

(Testimony of Margaret Kenny.)

deposition, [95] your deposition, commencing at line 13.

"Mr. Walsh: Q. Actually you did not really understand much about this, did you?

"A. No, I didn't. It was just what I was told.

"Q. There was considerable discussion between Mr. Price and your husband that you did not understand——

"A. That's right.

"Q. ——what all this was about?

"A. That's right.

"Q. Base premiums, whole life premiums?

"A. That's right.

"Q. Family income and all that?

"A. That's right.

"Q. And all you know is that your husband asked you to write a check for \$53.36?

"A. That's right.

"Q. And you did? "A. That's right.

"Q. You gave it to him? "A. Uh-uh."

You recall the question?

A. Yes, I do, yes.

Q. And the answers? A. Yes. [96]

Q. Now, I believe you said that the next time you saw Mr. Price after August 10th was on August 14th, was it?

A. Yes, in the morning.

Q. What's that? A. Yes.

Q. On August 14th, the day after Mr. Grant passed away. And Mr. Price came there and offered his condolences, did he not? A. Yes.

Q. And he asked you, he gave you back the

(Testimony of Margaret Kenny.)

check, didn't he? A. Yes, he did.

Q. And you accepted the check?

A. Yes, I did.

Q. And he asked you for a receipt?

A. He asked me for his receipt, yes.

Q. Now, at the time your deposition was taken, you were very positive that he did not ask for the receipt. You recall that, don't you?

A. Yes, I recall it.

Q. Now, you took back the check. What did you do with the check?

A. Well, I was so under sedatives and so upset, that I don't remember. I handed it to somebody; I don't know who it was.

Q. Did you ever send the check back to anybody connected with the Metropolitan Life Insurance Company? A. No, I didn't. [97]

Q. Did you ever since then instruct your attorneys to make any tender of any amount of money to the Metropolitan Insurance Company on account of this application for insurance?

A. No, I have not.

Mr. Walsh: Can it be stipulated, counsel, that no tender has ever been made of any amount of money since then to the Metropolitan on account of the premium on this application?

Mr. Brauer: Subsequent to death.

Mr. Boyle: So stipulated.

Mr. Brauer: Subsequent to death.

The Court: You stipulated to it; I don't think it makes any difference.

(Testimony of Margaret Kenny.)

Mr. Walsh: Q. Now, did I understand you to say that Mr. Price first called at your home in Watsonville early in June of 1954? A. Yes.

Q. How close can you fix the date?

A. Well, it was soon after I moved there and we moved there just about two weeks before school was out.

Q. Well, in your deposition now, Mrs. Kenny, you said that it was the latter part of June when Mr. Price first called there. What's happened that changed your mind?

A. I made a mistake. I thought it over. It would have had to have been the first part of June.

Q. So now it is your recollection it was the early part of [98] June?

A. It would have had to be, yes. It had to be. We moved there two weeks before school was out.

Q. You are positive now it was the early part of June? A. Yes, I am.

Q. Was it the first week in June?

A. Yes, I think so.

Q. You think it was the first week in June of 1954? The 1954 calendar shows that June 1st was on a Tuesday. Would you say that it was some time, then, before the 5th of June, which was a Saturday?

A. I couldn't say. I can't remember.

Q. But it was in the first week of June?

A. I think it was, yes.

Q. All right. Well, now, I want something more than what you think. I want a definite answer from you, Mrs. Kenny, because of the conflict in your

(Testimony of Margaret Kenny.)

testimony in your deposition and now. I would like to know whether it was the first week of June or the last week of June. You have had months to reflect upon this, so I think that we should have a definite answer.

Mr. Boyle: Your Honor, the question has been asked and answered. Why should the witness be harassed?

The Court: Yes, she has answered it. She says she thinks it was the first week of June. And going back that far, I would hate to try to give a definite answer—— [99]

Mr. Walsh: Q. All right, that's after reflection since this deposition was taken in March, on March 28th of 1956? A. That's right.

Q. And having reflected all during that time, you now say that he called the first week in June?

A. That's right.

Q. All right. And when was the second time he called? A. A few days later.

Q. A few days later. Did I understand you correctly to say that Peter Grant was not present on either of those two occasions? A. No.

Q. The third visit, was Peter Grant present?

A. That's right.

Q. What date was that?

A. I don't know the exact date. It was toward the end of June. It is very hard to know the exact date when something happened three years ago, even a year and a half.

The Court: Take a recess for fifteen minutes.

(Testimony of Margaret Kenny.)

(Recess.) [100]

Cross Examination

Mr. Walsh: Q. Mrs. Kenny, you said that Mr. Grant's occupation at the time in 1954 was as a crop duster.

A. That is correct.

Q. And he worked for the Atwood Company whose home office was in Salinas?

A. That is correct.

Q. And a moment ago you mentioned something about his going to the home office to collect some money and deposit it in the bank.

A. Yes, that is correct.

Q. You mean at the home office of Atwood?

A. Yes, in Salinas.

Q. Not the Metropolitan?

A. No, I meant the Atwood organization.

Q. Down around Watsonville they raise a lot of strawberries, don't they?

A. Yes.

Q. Lot of strawberry fields?

A. Yes.

Q. And on the morning of August 13th he was dusting a strawberry field, wasn't he?

A. That is what I was told.

Mr. Walsh: I think we can stipulate to that, Counsel, that [101] in his occupation in dusting strawberry fields he had to fly very low and hop over hedges and fences and trees?

Mr. Boyle: I can't with that simplicity describe the operation, Mr. Walsh. I would like to accommodate you on the stipulation, but shall we say this, that in dusting, fertilizing or fumigating crops the

(Testimony of Margaret Kenny.)

height at which the airplane flies is necessarily less than you will fly for pleasure or on a commercial line.

Mr. Walsh: Well, obviously. But you don't know very much about it, do you?

Mr. Boyle: I can say that at 6:00 o'clock every Sunday morning I am awakened by a crop duster that flies over my house dusting the fields just opposite.

Mr. Walsh: Q. Well, you can tell us, Mrs. Kenny, in Peter Grant's occupation he had to fly his airplane close to the ground?

A. Yes, he did.

Q. And he dusted things like strawberry patches and orchards and things of that sort?

A. That is right.

Q. And since there is no objection to the hearsay, you were told that he was doing that, dusting some strawberry patches, that morning of August 13th?

A. The reason I am not too sure of it, Mr. Walsh, is because he did different jobs the same mornings. I was told that he [102] was dusting a strawberry field when he had his accident, yes. It isn't just strawberries that he dusts.

Q. Now, do you know at what point during these various negotiations that were going on between Mr. Price and Mr. Grant, when Mr. Grant decided that he wanted \$10,000 of insurance instead of \$5,000?

A. Well, to my knowledge Mr. Grant wanted

(Testimony of Margaret Kenny.)

\$10,000 insurance before we ever met Mr. Price. He had talked about it.

Q. You yourself were not particularly interested in his taking out additional insurance, were you?

A. I didn't think we could afford it.

Q. The question was, you yourself were not particularly interested in his taking out additional insurance? A. Not as much as he was, no.

Q. Well, I will call your attention to your deposition, page 23, line 21. The question was, "Were you interested in having your husband get more insurance? A. No." Do you recall that?

A. Yes, I do.

The Court: I never knew a wife who was interested in her husband getting insurance.

Mr. Walsh: Pardon me, Your Honor?

The Court: I say I never did know a woman who was interested in having her husband get insurance.

Mr. Walsh: Some of them are very much interested, Your Honor. [103]

The Court: Well, I never knew one.

Mr. Walsh: And some women are interested in having insurance, too.

The Court: I know, but that is when they are figuring on poisoning them or something.

Mr. Walsh: Now, when Mr. Grant was working at crop dusting, did he leave home early in the morning? A. Yes, he would.

Q. And he would get home about 11:00 o'clock?

A. As a general rule, yes.

(Testimony of Margaret Kenny.)

Q. And then would stay home for a while?

A. Yes. He usually went to bed.

Q. Well, as I recall your testimony, you said he usually got home about 11:00 o'clock and stayed home until about 2:00 o'clock, and then he would go out somewhere and make arrangements for the next day's flying.

A. That is correct.

Q. And I think you also said that often times when he was home, say between 11:00 a.m. and 2:00 p.m., that you would be out shopping.

A. That was my only chance.

Q. I see. And he would stay home and take care of the children?

A. It wasn't the children so much as the phone. Somebody had to be at the phone. That was our business, Mr. Walsh. [104]

Q. What?

A. We ran the business in Watsonville for Atwood Crop Dusters.

Q. Now, the fifth time that Mr. Price came there, you said that was the first part of August, probably the 5th or 6th.

A. That is correct.

Q. And he showed Mr. Grant a letter or something?

A. I saw him with a piece of paper.

Q. You saw him with a piece of paper?

A. Yes.

Q. You don't know what it was?

A. I never read it.

Q. Do you recall about the middle of July Mr.

(Testimony of Margaret Kenny.)

Price coming out there and showing Mr. Grant some papers?

A. Not in the middle of July, no. No.

Q. And August 10th, that was in the evening, wasn't it? A. That is correct.

Q. Mr. Price had some other papers with him?

A. Yes, he did.

Q. Was there a letter or anything among those papers?

A. I don't know, Mr. Walsh. I didn't read them.

Q. The conversation at various times that Mr. Price was there went on between Mr. Price and Mr. Grant? A. That is correct.

Q. You didn't participate in the conversations?

A. No. [105]

Q. And you recall, do you, hearing Mr. Price saying to Mr. Grant that he would have to get information from the company before he could even determine whether or not the company would consider insuring Mr. Grant?

A. Yes, he did.

Mr. Boyle: One moment, Your Honor. May we have the time and place fixed in respect of this incident?

The Court: I know what it was. She has already testified to the matter. Go ahead, though. I think I know what it was. I think I heard it talked about before.

Mr. Walsh: Now, do you recall Mr. Price saying that on more than one occasion?

A. No, I do not.

(Testimony of Margaret Kenny.)

Mr. Walsh: That is all at this time, Your Honor.

The Court: Just to clear the matter up in counsel's mind, that was prior to the time when you gave the check?

A. That was two meetings back, yes.

The Court: Yes. That was what disturbed me, but I know what it was.

Mr. Boyle: It is in the record.

The Court: All right, it's in the record.

Mr. Walsh: Q. That one occasion you say? You only heard him say that on one occasion?

A. That is correct.

Q. And that was two meetings before August 10th? [106]

A. That was in the middle of July when he took the information about his crop dusting.

Q. I show you Plaintiff's Exhibit 5, which is the so-called AER 6 Form, which shows the date of July 14th. Is that the one?

A. Yes, that is it, Mr. Walsh.

Mr. Walsh: Thank you. I have no further questions at this time. I would ask that the witness remain. I may want to call her later.

The Court: You can step down. Oh, excuse me. Wait a minute.

Redirect Examination

Mr. Brauer: Q. On August 10th, 1954, Mrs. Kenny—— A. Yes?

(Testimony of Margaret Kenny.)

Q. —you were present the entire time that Mr. Price was there, is that right?

A. Yes, I was.

Q. And you were within hearing distance of the entire conversation, were you not?

A. As I said before, I was, when Mr. Price was there—we had a very small living room, and Mr. Grant sat across from me, which was kitty-corner from Mr. Price.

Q. And as to the conversation which took place on August 10th, 1954, it was as you have testified on direct examination?

A. That is right.

Mr. Brauer: Nothing further. [107]

Mr. Walsh: One further question, or a couple of them.

Recross Examination

Mr. Walsh: Q. At that time, isn't it true that when Mr. Price called there, that your children were eating dinner?

A. That is possible. I don't quite remember. It was around dinner time.

Q. And you had a separate dining room, that is, a dining room separate from the living room, didn't you?

A. Well, Mr. Walsh, they wouldn't have been eating in the living room.

Q. Were they eating in the dining room?

A. No, they would have had to been in the kitchen.

Q. It is quite possible that during that time you

(Testimony of Margaret Kenny.)

got up and went in to help the children or do something?

A. That is possible. Any mother would.

Q. So it is quite possible that you were not present during the entire conversation on the evening of August 10th, is it not?

A. It was very little. I was there most of the time. If I got up with the children, I can't remember whether I did or not.

Q. But that is possible.

A. That is possible, yes.

Mr. Walsh: Thank you, that is all.

Mr. Brauer: That is all, Mrs. Kenny.

(Witness excused.) [108]

The Court: Call your next witness.

Mr. Boyle: Plaintiff will rest, Your Honor.

Thereupon, the Plaintiff rested its case in chief.

Mr. Walsh: I should like to move, Your Honor, that the testimony of this doctor—what was his name?—Sambuck as to his opinion concerning whether or not he would have approved—I think he gave an opinion that he would have approved this man as a standard risk for life insurance. I move that that testimony as to his opinion be stricken.

The Court: The motion will be denied at this time, without prejudice to the Court passing on it in the final determination of the case.

Mr. Walsh: Very well, your Honor.

I would like to make a motion at this time to

dismiss the complaint upon the ground that the plaintiff has not proved a case of a contract.

The evidence shows that the application which was submitted called for a medical examination. The applicant full well knew he had to have a medical examination, and his wife knew it also; and she even went and made the appointment with the examining physician; that the application was never completed.

The written document upon which the plaintiff relies, in addition to the ones pleaded in the complaint, require several things, among which is a medical examination. Obviously, no application for insurance can even be entertained until there [109] is a medical examination.

The application itself, which the applicant signed, says that, "if an amount equal to the full first premium on the policy applied for is paid to and accepted by the company at the time part A of this application is signed, and if this application"—being the whole application—"is approved at the Company's Home Office for the class, plan and amount of insurance herein applied for, then the insurance in accordance with the terms of the policy applied for shall be in force from the date hereof."

The receipt was given, the application itself, recite that the \$53.36 was paid on account. At this point, of course, the evidence, as I understand Mrs. Kenny's testimony is that she was informed that that was the full first premium.

But let us pass on to the other conditions.

I think it is so apparent that it needs hardly any

mention that there had to be a medical examination. There had to be questions asked by the examining physician of the applicant, recorded on part b of the application, certified to and signed by the applicant with the signature of the doctor as a witness.

This shows that that was never completed, and of course the undisputed testimony in the case shows that he never had a medical examination.

Now, with respect to the law on that subject, counsel for the plaintiff has submitted to Your Honor a trial brief in which [110] they rely upon the California Supreme Court case of Ransom vs. the Penn Mutual Life Insurance Company, and they say that that is the authority upon which they rely.

I should like to point out that that case differs completely from this one in that, first of all, the holding of that case was that under those particular circumstances and the particular language of the application of the policy—particular application, after it had been completed, including the medical, and received by the company at its home office, then a contract of insurance came into effect. Because of the particular language in the application. There was no receipt involved in that. Because of the particular language of that application, they held that whether or not the applicant was insurable medically was a condition subsequent. [111]

Now in that case, the applicant was examined by the examining physician, the full first premium was paid, those papers were received by the Com-

pany at the home office and the underwriting department wrote for more medical information. And before it was received, the applicant died. Now, all that case held was that the additional medical information on that aspect of the case, the additional medical information that they received, was not such as would vitiate the policy. In other words, that the applicant had not, in the medical part, Part B of the application, concealed from the Company anything material to the risk so far as his medical history was concerned. But on the question of contract, that case said there was a contract only when the completed application, including the medical and the full first premium, were received by the Company at its home office. And there is no case cited by the decision in that Ransom case that holds that you can have a contract of insurance without a medical examination where a medical examination is required. So there is no holding in California on this precise point. The Ransom case is not this situation.

Now, we have a statute in California that covers this subject, Insurance Code Section 10,115, which says:

“When a payment is made equal to the full first premium at the time an application for life insurance other than group life insurance is signed by the [112] applicant, and either the applicant received at that time a receipt for said payment on the form prepared by the insurer, or in the absence of such a receipt, the insurer receives the said payment at its home office, branch office, or the office of

one of its general agencies, and in either case the insurer, pursuant to its regular underwriting practices and standards, approves the application for the issuance by it of a policy of life insurance on the plan and for the class of risk and amount of insurance applied for, and the person to be insured dies on or after the date of the application, on or after the date of the medical examination, if any, or on or after any date especially requested in the application for the policy to take effect, whichever is later, but before such policy is issued and delivered, the insurer shall pay such amount as would have been due under the terms of the policy in the manner and subject to the same rights, conditions and defenses as if such policy had been issued and delivered on the date the application was signed by the applicant."

Now, the Ransom case, the application—And incidentally, although counsel in their trial brief mentioned that as a case being decided on a receipt, there is nowhere any mention of a receipt in the Supreme Court decision. What the Court decided upon was the construction of the clause in the [113] application, and that clause read this way:

"If the first premium is paid in full in exchange for the attached receipt signed by the Company's agent when this application was signed, the insurance shall be in force from the date of Part I or Part II of this application, whichever is the later, provided the Company shall be satisfied that the proposed insured was at that date acceptable."

Now, I can understand how the Court could say

that the satisfaction of the Company is a condition subsequent, and therefore it's up to the Company to prove that he was not insurable by reason of the medical information they had. But what the Court held, the Supreme Court of California, in that case so far as the contract is concerned, and there was no dispute there about the payment of the full first premium, there was a full first premium; the court said: "We are of the view that a contract arose upon defendant's receipt of the completed application and the first premium payment." That's all that the Ransom case holds so far as the contract is concerned.

Here we have an incomplete application. Under the law, an application by an applicant to an insurance company is an offer, and upon the acceptance and approval, you have a contract, providing there is a meeting of the minds. In other words, if it is approved for the plan, class and amount. [114]

Now, we have to look long and hard to find a case that is similar to this one, and I think the reason is obvious, that ordinarily people don't bring a suit when they haven't even made an offer. But we find a case where the application, the language of the application and the language of the receipt, were identical with this one, the case of Hyder against Metropolitan Life Insurance Company, a South Carolina case, 190 Southeastern 239. In that case they distinguish between the language set forth in the application of the Metropolitan and the language set forth in the receipt of the Metropolitan, with that issued by the Equitable Life Assur-

ance Society, which was almost exactly like the language in the Ransom against Penn Mutual. And they held where no medical examination was had, there was no contract of insurance.

Now, in the Federal Courts, there is a case that is quite close to this, although the language of the application and the receipt, we would say, were more favorable to the plaintiff than here. But nevertheless, the Court said—pardon me a moment, Your Honor; I seem to have misplaced it.

The case of Corn against United American Life Insurance Company, decided in the United States District Court in Colorado in 1952, reported in 104 Fed. Sup. 612. There was a case where the full first premium was paid, but the insured died before he had had the medical examination. The Court held that the plaintiff could not recover, and the Court said: [115]

“Diligent search has failed to reveal a single authority which recognizes the existence of interim insurance where the alleged insured himself had failed to take steps upon which the agreement of the parties conditioned liability.”

Now, Your Honor, there was no condition so far as the medical feature of this application was concerned to be performed by the defendant in this case that wasn't performed. It was up to the applicant to perform a condition precedent to even the completion of the application, namely, to submit himself and have a medical examination, and to give a medical history to the examining physician, and to certify to the correctness of that medical his-

tory. That was not done; unfortunately, the applicant died before his appointment with the examining physician. The applicant's wife herself made the appointment. The applicant did not keep the appointment. There was a condition to be performed by him that was not performed. Therefore, Your Honor, on the fundamental principles of contract and common sense and good reason, there should be no contract of insurance here, and I think that now is the time to determine that, rather than put this defendant to the further trouble and expense of having to defend on this case where, as I say, there was never even an offer made for insurance.

So I ask that this complaint as to the second and third [116] causes of action be dismissed.

The Court: I may have to hold with you on the technical questions that you have raised here from a strictly technical standpoint. This may be a case that can't be decided on justice, but might have to be decided on the law. I realize that we have a great many cases in this day that have to be decided on the technicalities of the law instead of deciding on justice, and I may have to finally agree with you. But from all standpoints of justice and right, this woman is entitled to this money, and for the present I am going to overrule your objection and take the matter up when I render my final decision after the case has been submitted to me. So the motion at this time will be denied without prejudice to the Court reconsidering the question that you have raised at a later time.

Mr. Walsh: Very well. Mr. Price, will you step forward?

The Court: I see it is five minutes to 4:00. Do you think we better adjourn until 10:00 o'clock tomorrow morning?

Mr. Walsh: That is agreeable with me, Your Honor.

The Court: Agreeable with you?

Mr. Boyle: Thank you, Your Honor.

The Court: Adjourn until 10:00 o'clock tomorrow morning.

(Whereupon a recess was taken until 10:00 o'clock tomorrow morning, Thursday, June 20, 1957.) [117]

Thursday, June 20, 1957—10:00 o'clock a.m.

The Clerk: Margaret L. Grant versus Metropolitan Life Insurance Company, on trial.

Mr. Walsh: I should like to call Mrs. Kenny as an adverse witness.

The Court: Yes, you may.

MARGARET L. KENNY

was recalled as an adverse witness by the defendant, and having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

Mr. Walsh: Q. Mrs. Kenny, I don't believe you have told us where you reside.

A. At present?

Q. At present. What is your address?

(Testimony of Margaret L. Kenny.)

A. I have two addresses. My house number is 521 Seventh Street. My mailing address is 187—

Q. Will you speak up a little?

A. My house number is 521 Seventh Street in Davis.

Q. You live in the City of Davis?

A. Yes, we do.

Q. Now, you mentioned yesterday that you read a trial application. [119]

A. That is correct.

Mr. Boyle: Pardon me.

Your Honor, that is not my recollection.

Mr. Walsh: I have the transcript of yesterday's testimony, at page 93, line 21 (reading):

"I read the trial application, which was taken at that meeting, which I did not attend."

Q. That meeting you refer to was the fourth visit Mr. Price made; do you recall that, now?

A. Yes.

Q. And that was about when?

A. Well, according to the application, it was the end of June.

Q. How do you identify that as the trial application?

A. That is what the application said, that they showed me.

Mr. Walsh: May I have Exhibit No. 1, please?

Q. I show you Plaintiff's Exhibit 1. Did it look anything like that?

A. That was not the paper.

Q. Did it look anything like that? Will you

(Testimony of Margaret L. Kenny.)

examine it, please? A. That I can't tell.

Q. Was it in that form?

A. It wasn't the two papers that I saw. It said at the top, "Trial Application." [120]

Q. You say it wasn't two papers?

A. I was shown one sheet of paper, a photo-static copy. It said "Trial Application" at the head of it.

Q. When did you read that trial application?

A. Two days before court.

Q. Oh.

A. I wasn't shown it. You have it.

Q. Did it say "Trial Application" on it?

A. Yes.

Mr. Walsh: Counsel, do you have that?

Mr. Boyle: Yes, sir. Yes, I have the letter that was shown to Mrs. Kenny.

Mr. Walsh: This is not an application. You are showing me a letter dated June 28, 1954, from Mr. Wigham to the Metropolitan Life Insurance Company.

Mr. Boyle: That is what the witness is referring to, what I think she might have in mind.

Mr. Walsh: Q. I show you what your attorney has just handed me, a photostat of a letter of June 28, 1954, from Mr. Alan C. Wigham to the Metropolitan Life Insurance Company. I will show that to you. Is that the document to which you are referring? A. Yes, it is.

Q. And you saw this just two days before the trial started? A. That is correct. [121]

(Testimony of Margaret L. Kenny.)

Mr. Walsh: Will it be stipulated, Counsel, that I furnished you with this photostat several months ago?

Mr. Boyle: So stipulated. Do you wish to offer it, Mr. Walsh?

Mr. Walsh: No, I am going to put the original in later.

That is all, Mrs. Kenny, thank you.

(Witness excused.)

Mr. Walsh: Mr. Wigham, will you come forward, please?

ALAN C. WIGHAM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows: .

The Clerk: Q. Please state your name and occupation for the record.

A. Alan Wigham.

The Reporter. Q. Will you please spell your last name?

A. W-i-g-h-a-m; A-l-a-n is the first name.

I am presently on disability with the Metropolitan Life Insurance Company.

Direct Examination

Mr. Walsh: Q. Mr. Wigham, in response to my questions, will you speak up clearly so counsel sitting way over here can hear you?

A. Yes, I will, sir.

Q. Your full name is Alan C. Wigham? [122]

A. That is right.

(Testimony of Alan C. Wigham.)

Q. Where do you reside, Mr. Wigham?

A. 1524 Salinas Highway, Monterey.

Q. What is your present occupation?

A. Presently I am on disability with the Metropolitan Life.

Q. You are not actively engaged as an employee of the Metropolitan Life Insurance Company?

A. Not at this time, no.

Q. In 1954 were you an employee of the Metropolitan? A. Yes.

Q. In what capacity?

A. As manager of the Monterey District Office.

Q. How long have you been manager of that office? A. A little over 14 years.

Q. All told? A. Yes.

Q. Is that what is called a district office?

A. Yes, it is called the district office.

Q. Do you know, and did you know then, Mr. George I. Price? A. Oh, yes, yes.

Q. Was he an employee of the Metropolitan?

A. Yes.

Q. What was his—in what capacity was he employed by the Metropolitan in 1954?

A. As an agent in the Watsonville area. [123]

Q. What is that?

A. As an agent in the Watsonville area.

Q. What kind of an agent?

A. Well, he was collecting agent and soliciting new insurance.

Q. What is that?

(Testimony of Alan C. Wigham.)

A. Collecting premiums and soliciting new insurance.

Q. He was a soliciting agent, is that what it is called? A. That is right.

Q. Did the company have any general agency in that area?

A. No, the company does not have general agencies.

Q. Was Mr. Price in your district?

A. Yes. Detached. He worked out of the Monterey District Office as a detached agent.

Q. He was what is called a detached agent?

A. That is right.

Q. And he worked under your supervision and control? A. That is true.

Q. Business that was handled by Mr. Price came through your district office, did it?

A. Yes, business was handled through our district office in all phases, except that insurance requiring medical examinations, when it was prepared for the examination it went directly to the doctor in the local area.

Q. Now, can you tell me, Mr. Wigham, whether or not a soliciting agent of the Metropolitan such as Mr. Price in 1954 [124] had any authority to enter into any contract of insurance?

Mr. Boyle: Objection, Your Honor,—

Mr. Walsh: Let me finish the question, please.

Mr. Boyle: I am sorry.

Mr. Walsh: Q. (continuing) —have any authority to enter into any contract of insurance on

(Testimony of Alan C. Wigham.)

behalf of the Metropolitan Life Insurance Company? A. No, none whatsoever.

Mr. Boyle: Objection, Your Honor. We move to strike the answer.

The Court: It may be stricken.

Mr. Boyle: Incompetent, irrelevant, immaterial.

The Court: I will reinstate the answer subject to your objection.

Mr. Boyle: May I also add to my objection it isn't shown here there was any such limitation was shown to either Peter Grant or his wife?

The Court: I will let the answer stand and rule on its admissibility later.

Mr. Walsh: Q. Mr. Wigham, did you, as manager of the Monterey District Office, have any authority to enter into any contract of life insurance on behalf of the Metropolitan Life Insurance Company? A. No, none whatsoever.

Mr. Boyle: Same objection, Your Honor. [125]

The Court: Yes. The objection may go in ahead of the answer.

Mr. Boyle: May we also at this time state the further objection that it violates the parol evidence rule and the extrinsic evidence rule? The same goes as a basis for the motion to strike.

Mr. Walsh: Your Honor, please, all the way through counsel has made a point of this matter of authority of the agent, has requested Your Honor to receive evidence, which Your Honor has received; on the question of authority.

(Testimony of Alan C. Wigham.)

Now, we have here a man who is well qualified to testify on that point.

The Court: I will hear you on that question later. At present I will overrule the objection without prejudice to striking the answer later if I find it is not admissible in the opinion of the Court.

Mr. Walsh: Thank you, Your Honor.

Q. I will show you Plaintiff's Exhibit 1, Mr. Wigham, which is an application Form 036-K-9.

A. Yes.

Q. Is that the form of application that in 1954 was customarily used by the company?

A. Yes.

Q. Can you tell me what is required in order to complete such an application? [126]

Mr. Boyle: Objection, Your Honor, on the same ground previously stated to this evidence, and on the further grounds that it calls for a conclusion of the witness.

The Court: Yes, I think it does. The objection will be sustained.

Mr. Walsh: Well, if Your Honor please, that goes to the very essence of this issue.

The Court: If you feel that way about it I will reserve ruling on it and let him answer.

Mr. Walsh: I think it is very relevant.

The Court: It may be. If you think so, I will let it go into the record, with the understanding that I am doing so subject to striking it later if I find it is not material.

Mr. Walsh: Then the witness may answer?

(Testimony of Alan C. Wigham.)

The Court: Yes, he may answer.

Mr. Walsh: Q. The question was, Mr. Wigham, what is necessary to complete such an application for insurance? I don't mean to go into all the details. Briefly, Part A has to be completed, does it not?

A. Well, the writing agent completes Part A, of course, answering all these questions carefully. And in an application like this the next requirement is a medical examination, and at the same time, when he completes this he does what is known as the mercantile report; then he is supposed to put it in the doctor's hands for an examination—medical [127] examination.

Q. Now, would that medical examination, the results of it, be recorded in Parts B and C of this application? A. That is right.

Q. And would the detached agent such as Mr. Price, if Part A of the application is signed—and that requires it be signed by the applicant, does it not? A. Yes.

Q. Then after Part A is signed by the applicant what would the agent do with the application?

Mr. Boyle: Objected to, Your Honor.

The Court: Same ruling.

Mr. Boyle: Same objection.

The Court: Same ruling.

A. He is supposed to put it in the doctor's hands, or he does put it in the doctor's hands. Sometimes he makes the appointment, sometimes he leaves it to the applicant to phone the doctor to

(Testimony of Alan C. Wigham.)

make an appointment, so that there will be no delay when the applicant calls at the doctor's office.

Mr. Walsh: Q. And then after the doctor—is the doctor required to have the applicant appear before him and answer certain questions as to his medical history? A. Yes.

Mr. Boyle: Just a moment.

The Court: Just a moment. [128]

Mr. Boyle: We will object to this evidence as incompetent, irrelevant and immaterial. It is an attempt to limit the scope of agency, and there is no showing here of any limitation in the scope of the agency which was called to the knowledge of Peter Grant or his wife.

It is a violation of the parol evidence rule and the extrinsic evidence rule.

Now, Your Honor, may I suggest—I take it that all of this evidence will be of like character. I don't like to interfere with the examination. Possibly if Mr. Walsh is agreeable, we can stipulate that my objection will go to all of this evidence, and it will be subject to a motion to strike on all the grounds stated. Then possibly he can proceed uninterrupted by me.

The Court: Yes. I might say, my first thought in the matter is that you are correct in your objection, but this being a Court trial, I would like to have the opportunity to rule on the admissibility later.

I will permit this testimony subject to your objection, with the understanding that the Court, re-

(Testimony of Alan C. Wigham.)

Regardless of whether you make a motion to strike it or not, the Court will not consider this testimony if it finds that your objection is well taken.

Mr. Boyle: And may that extend to the entire testimony, so I will not interject myself? [129]

Mr. Walsh: I won't stipulate to that. I think this is perfectly proper.

The Court: I think you had better make your objection, to keep the record clear.

Mr. Boyle: Very well, Your Honor.

The Court: Because there might be some questions the Court would want to rule differently on.

Mr. Walsh: Q. Mr Wigham, those questions that are asked by the doctor, the examining doctor for the company, are then recorded on what part of the application?

Mr. Boyle: The same objection, Your Honor.

The Court: Same ruling.

You may answer.

Mr. Walsh: You may answer.

A. The questions are, each and every one, asked by the doctor. If incomplete, it comes back. And once an application is in the doctor's hands, of course, we, as field men, are not allowed to know any of the medical evidence, and he sends it directly, after obtaining the signature to these questions from the applicant, he sends it directly to the head office, after getting all the answers to the questions.

Q. I call your attention to Part B of the application, and to the bottom of the page. To com-

(Testimony of Alan C. Wigham.)

plete that part of the application is the signature of the applicant required?

A. Oh, yes. [130]

Mr. Boyle: Same objection, Your Honor.

The Court: Same ruling.

Mr. Boyle: Calls for a conclusion of the witness.

The Court: Same ruling.

The Witness: It would only be returned——

Mr. Walsh: If Your Honor please, I would like to make this point right now: that the question of law that has been raised by the plaintiff here is whether or not there was a completed application.

Now, I think we are entitled to show that in this type of application for this type of policy what constitutes a completed application. That is certainly an essential part of the question, of the case, and this man has had 14 years experience as a district manager, and he has viewed many of these applications, and he knows the requirements of a completed application.

The Court: I am going to permit this testimony in at this time. I don't agree with you, but I am going to let you put the testimony in for the record, subject to the objection, and the Court will determine whether it shall be stricken later.

Mr. Boyle: We will add the further objection at this time that this not the best evidence. The document speaks for itself.

The Court: I think so, but I will make the same ruling. [131]

Mr. Walsh: Q. All right, Mr. Wigham, your

(Testimony of Alan C. Wigham.)

answer was Part B requires the signature of the applicant?

A. Oh, yes. It would be returned if there was no signature. Be no action.

Q. Speak up a little, please.

A. I say it would be returned and there would be no action, without his signature.

Q. And Part C of the application, that relates to what?

Mr. Boyle: May I have that question again, Mr. Walsh?

Mr. Walsh: Q. Part C of the application relates to what?

Mr. Boyle: Objection. It isn't the best evidence. The document speaks for itself.

The Court: Same ruling.

A. These are questions that only the medical—the examiner can answer—can ask and ascertain the answer from him. It would have to be done totally.

Mr. Walsh: Q. Now, in a case of this kind, with the detached agent, after the examining physician has completed the application, Parts B and C, does it come through your office? A. No;—

Mr. Boyle: Objection, Your Honor,—

A. (continuing) —it goes directly to the same office.

Mr. Boyle: (continuing) —incompetent, irrelevant and immaterial; not the best evidence; calls for a conclusion of [132] the witness, and is not the best evidence.

(Testimony of Alan C. Wigham.)

The Court: The answer is stricken for the purpose of entering that objection, and the Court will make the same ruling, and the answer will be reinstated.

Mr. Walsh: Q. You may answer the question.

A. Yes. If anything——

Q. Do I understand that——

A. Anything that goes to the medical examiner we do not see. It goes direct, in other words. We don't have access to the physical condition at all after it goes to the doctor's hands.

Q. And then it would go directly from the doctor to the San Francisco office?

A. Directly to the medical division in a prepared envelope.

The Court: For the purpose of the record, let it be shown that the same objection is made and the same ruling applies to all these answers.

Mr. Boyle: Yes, Your Honor.

Mr. Walsh: Q. Now, Mr. Wigham, I show you a letter of June 28, 1954.

If the Court please, counsel has a photostatic copy of this (exhibiting document to Mr. Boyle).

May we have just a moment, Your Honor? To save a little time, counsel and I are looking these things over, and he wants to be sure he has a copy of them.

Q. I show you a letter dated June 28, 1954. Can you tell me [133] what that is? Did you write that letter, Mr. Wigham?

(Testimony of Alan C. Wigham.)

A. Yes. Yes, it was written by me, or dictated by me.

Q. And it was sent to whom?

A. It was sent to our Ordinary Application Division.

Q. That is here in San Francisco?

A. Yes. The underwriters.

Q. That is what is called the Pacific Coast Head Office of the Metropolitan?

A. That is right.

Q. Thank you. Now, at the time you wrote this letter the stamp and the pencilled notes were not on there, were they?

A. Well, I don't know. Oh, no, this is the head office stamp. There are some pencilled notations there, and I wouldn't know about those.

Mr. Walsh: Yes.

I will offer that——

Mr. Boyle: One moment.

Mr. Walsh, may I make an inquiry? Mr. Walsh, is the purpose of this offer simply to show one of the circumstances under which the application was eventually taken, or is it your purpose at this time to offer this to vary the terms of Part A, which we claim to be a contract?

As a circumstance, I think it is admissible. But this relates to a policy in a different amount.

Mr. Walsh: I think that is a good question, Mr. Boyle. [134] I would like to know now what the theory of the plaintiff is, what your contract is that you are claiming.

(Testimony of Alan C. Wigham.)

And in reference to that, I wish to call the Court's attention to the fact that in the complaint the plaintiff attached only a photostat of Part A of the application and a photostatic copy of the receipt. However, the plaintiff has introduced into evidence for all purposes the complete application—the uncompleted, but the entire application, including Parts A, B, and C, a little slip of paper here that was detached and perforated there, and then has introduced a number of other documents, and then he makes objections about varying the terms of the contract.

I am rather at a loss to know what he claims is the contract.

If you would explain, Mr. Boyle, what your theory is?

Mr. Boyle: Yes. The contract in these documents is apparent in the terms of the receipt, and also in Part A of the application itself. That is the contract.

The Court: Well, I am of the opinion that that's your whole case, and you have to either fall or stand on it.

Mr. Boyle: Right, sir.

The Court: I feel very certain a great deal of this other testimony has nothing to do with this case so far as the Court passing on it is concerned.

Mr. Boyle: I understand that. [135]

The Court: The reason I have been very liberal is because it is a Court case, and I can assure both sides that I will not be prejudiced by any testimony

(Testimony of Alan C. Wigham.)

that I strike from the record before I finally pass on this case. But I am going to continue to be very liberal and let the testimony go into the record. I don't like to rule on objections the way I am doing it.

Mr. Boyle: I understand.

The Court: If I had a jury, of course, I wouldn't think of it.

Mr. Boyle: Of course not.

The Court: It makes me a little more work, of course. There are quite a few problems among the things that have been raised here that the Court should give consideration to before ruling.

Mr. Boyle: If Your Honor please, if I may elaborate a little bit on some of our principal objections: As I understand the extrinsic evidence rule, neither parol nor written evidence predating the contract, or subsequent to a contract, is admissible to vary its terms. Prior negotiations are merged in the contract.

However, evidence of the circumstances under which a contract is made is admissible for the purpose of putting the Court in the same position in which the parties found themselves at the time the contract was made, so that the Court [136] can truly interpret the intent of the parties in entering into it.

Now, that is, generally speaking, our position here in respect to that principal objection.

The Court: Well, you gentlemen have each had

(Testimony of Alan C. Wigham.)

plenty of time to study this case before you started the trial. The Court hasn't had that opportunity.

Mr. Boyle: I understand.

The Court: I think it is better to proceed the way we are now and let you present your case, and later, after the evidence is in, I will rule.

Mr. Boyle: Thank you.

Mr. Walsh: I might just make one remark in response to Mr. Boyle. Had he stayed with his theory, as he expresses it now, we would have probably finished this trial in a couple of hours.

The Court: Yes.

Mr. Walsh: But the plaintiff proceeded to introduce documents, and then put on all kinds of evidence to which I objected as being immaterial. Then Your Honor allowed the evidence in. Now he wants to cut me off from replying to the testimony that has already gone into the record.

The Court: Well, I let that testimony go in, as I remember, subject to your objection, with the same thought in mind, that I would rule on the admissibility later. [137]

I am inclined to agree with both of you that this case has to stand or fall on this application.

Mr. Walsh: On the whole application.

The Court: Yes.

Mr. Walsh: Not Part A of the application.

The Court: I think it has to stand or fall on it. But I am just saying that now. That is without prejudice to——

(Testimony of Alan C. Wigham.)

Mr. Walsh: I think this series of letters, Your Honor, will give you a true picture.

The Court: I am just wondering if you couldn't stipulate that those letters could go in evidence, to save some time, and get them in the record with the understanding that your objection applies to them.

Mr. Boyle: That is perfectly all right.

Mr. Walsh: All right. Then I would like to put them in one at a time. The first is a letter of Mr. Wigham dated June 28, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit A.)

Mr. Walsh: The second one is a reply letter dated July 6, 1954, from Jonas Svendsen, Chief Underwriter.

The Court: It may be admitted. As he goes through those they may be marked and admitted, subject to the objection.

(The letter referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Walsh: The next one is a letter from Mr. Wigham to the Metropolitan Ordinary Underwriting Department dated July 15, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Walsh: And the next one is a letter from Jonas Svendsen to Monterey, dated July 20, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit D.)

Mr. Walsh: The next one is a letter from Mr.

(Testimony of Alan C. Wigham.)

Wigham to the Ordinary Underwriting Department, San Francisco, dated July 26, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit E.)

Mr. Walsh: The next one is a letter from Jonas Svendsen, Chief Underwriter in San Francisco, to Mr. Wigham in Monterey, dated July 30, 1954.

(The letter referred to was received in evidence and marked Defendant's Exhibit F.)

Mr. Walsh: The next one is a letter dated August 20, 1954, from Mr. Wigham to the Claims Division of the Metropolitan in San Francisco.

(The letter referred to was received in evidence and marked Defendant's Exhibit G.)

Mr. Boyle: Mr. Walsh, before you proceed, and in order [139] to clarify the record, Your Honor, in respect to certain of these letters, the plaintiff will state at this time that we withdraw any objection to the letter of June 28, 1954; similarly, to the letter of July 6, 1954; similarly, we withdraw any objection to the letter of July 15, 1954.

Your Honor, to the letter of July 20, 1954, we withdraw any objection to the admissibility of the first paragraph of that letter. In respect to the second paragraph of that letter we restate our objection that it is in violation of the extrinsic evidence rule, and an attempt to vary a written contract by preceding writings and parol evidence.

We have no objection to the letter of July 26, 1954.

(Testimony of Alan C. Wigham.)

We have no objection to the letter of July 30, 1954.

In respect to the letters of August 20, and August 25, 1954, in addition to the general objection of incompetent, irrelevant and immaterial, the objection that it is a violation of the extrinsic evidence rule and the parol evidence rule.

We offer the further objection that there is no proof or showing that either of these documents ever came to the attention of the plaintiff.

The Court: All right. I will let you withdraw the objections which you stated you wanted to withdraw, and my same ruling will apply to the rest of it.

Mr. Walsh: If your Honor please, I would like to say [140] this right now: this contract, if any—this application—is a matter not between the plaintiff and the defendant. These negotiations were conducted between the soliciting agent of the Metropolitan and Mr. Grant.

Now, any statements that may have been made by Mr. Grant are admissible, of course, against interest. Apparently counsel is under the impression, and from the testimony would almost believe, that the plaintiff in this case was the applicant, but that is not the case.

The Court: Yes, I understand that.

Mr. Walsh: Now, I would like to have Exhibit A, and the rest of those, please.

Q. Defendant's Exhibit A, a letter from Mr. Wigham, in that it says (reading):

(Testimony of Alan C. Wigham.)

“Our agent sends us the attached trial application. On Policy 20158526-A there is an extra aviation premium.”

Now, that policy, Mr. Wigham, was a policy that had previously been issued, had it not?

A. Yes. What we call an in force policy.

Mr. Walsh: To save time, Counsel, I think we can stipulate, can we not, that that policy was issued in 1950, before Mr. Grant became a crop-duster?

Mr. Boyle: We have the exact date. I think the date was March, 1950. [141]

The Court: Well, there can't be any question about that?

Mr. Walsh: May I make a statement, and if I am incorrect, Counsel, you can correct me?—

Mr. Boyle: Pardon me. May 1, 1950.

Mr. Walsh: That policy, the number of which I just mentioned, was issued in 1950 when Mr. Grant lived in Concord. He was not a crop-duster, but at that time he was working for the Shuey Milk Company, I believe, as a truck driver, and was taking flying lessons.

According to Mrs. Kenny's testimony yesterday, she said he did not become a crop-duster until later.

Mr. Boyle: That is right.

Mr. Walsh: I think it will also be stipulated that the face amount of \$5,000, plus some additional sums, were paid on that policy, which is not involved here.

The Court: Yes, that is understood.

(Testimony of Alan C. Wigham.)

Mr. Walsh: Q. Now, in your letter, Mr. Wigham, of June 28th, it reads (reading):

“Our agent sends us the attached trial application. On Policy 20158526-A there is an extra aviation premium.

“Will you advise if an additional \$5,000 may be submitted on a whole life, paid up at age 85 plan, and what the extra aviation premium will be?”

Now, I want to ask you a couple of questions about that, [142] Mr. Wigham:

The attached trial application that you mentioned in there had nothing to do with that Policy Two Zero and so forth, did it? A. No.

Q. Why did you mention the number of that policy?

A. So the company could make an identification with our previous application on the risk.

Q. In other words, so they could identify who the insured was? A. Yes.

Q. Now, this trial application that you mention in there, where did that trial application come from?

A. It came from Mr. Price in Watsonville.

Q. I see. Now, correspondence and inquiries—rather, inquiries to the company that an agent wished to make had to come through your office, did they?

A. I beg your pardon? Oh, yes.

Q. Inquiries that an agent wished to make to the head office—— A. Yes.

(Testimony of Alan C. Wigham.)

Q. (continuing) —had to come through you?

A. Yes, they came through our district office.

Q. Now, in there you mention that the trial application is for \$5,000, is that correct?

A. Yes. [143]

Q. And the plan of insurance is what?

Mr. Boyle: Your Honor, please, the document is the best evidence.

The Court: Yes, the document is certainly the best evidence.

Mr. Walsh: Q. And the plan of insurance is what?

A. It is a life policy which does become paid up if the insured lives to age 85.

Q. Now, there was nothing in that trial application, to your recollection, about any family income, was there?

Mr. Boyle: Your Honor, please——

The Court: Just a moment.

A. I would have mentioned——

The Court: Just a moment.

Mr. Boyle: Objection; incompetent, irrelevant and immaterial. It is not the best evidence.

The Court: Yes. We are getting far afield here. I should sustain this objection, but in view of the fact that I have been letting you make this record, I will let him answer.

Certainly, under the rules, the document itself speaks for itself, and does not require explanation so far as the witness is concerned. But I will hear the explanation on the part of the witness.

(Testimony of Alan C. Wigham.)

I think, just in order to save time, that the record may show that the plaintiff has an objection to any testimony from [144] this witness explaining these documents, and that I will let him go ahead and testify with the understanding that the Court will determine later whether it will consider the testimony or not. [144-A]

Mr. Walsh: Q. All right, Mr. Wigham, you may answer. There was nothing in there about family income, was there? A. No.

Mr. Walsh: That was Defendant's Exhibit A that I showed you.

Q. Now, I am referring to the Defendant's Exhibit B dated July 6, 1954, from Mr. Svendsen, Chief Underwriter, in San Francisco, back to Monterey:

"We have your letter of June 28th together with partially completed Part A of application form 036K-9, indicating this is a trial application, and you request we advise you as to what the extra aviation premium will be on this case. In order that we may give this trial application further consideration and quote the proper aviation premium, will you kindly complete Form 036 Aer. 6, (and I will refer to that briefly as 'Aero 6') giving us full and complete details in regard to the applicant's past, present and future aviation activities. This aviation supplement should always be completed whenever an applicant intends to fly as a pilot or student pilot within the next 12 months. If you will please, therefore, complete the necessary aviation questionnaire,

(Testimony of Alan C. Wigham.)

further consideration can be given this trial application.”

Now, you received that letter, did you, Mr. Wigham? [145] A. Yes.

Q. And I show you Plaintiff's Exhibit No. 5, Aviation Questionnaire. Is that the form that is referred to in Defendant's Exhibit B? A. Yes.

Q. Of course it was blank at that time, wasn't it? A. That's true.

Q. Now I will show you, or I will read to the Court, Defendant's Exhibit C. letter from Mr. Wigham to the Ordinary Underwriting Division of Metropolitan in San Francisco. It says:

“Attached is aviation questionnaire Form 036 Aer 6,” and again I call your attention, Mr. Wigham, to this Defendant's Exhibit C. You wrote that, did you? A. Yes.

Q. And did you enclose with that, Plaintiff's Exhibit 5, the completed aviation questionnaire?

A. Yes, it would have been attached, if I stated it was attached.

Q. And from whom did you receive this completed aviation questionnaire before you mailed it to San Francisco?

A. I think it is from Agent George Price, Watsonville.

Q. Would that have come by mail?

A. Yes.

Q. Ordinarily, does it take about one day for mail to go back from Monterey to Watsonville?

A. Yes.

(Testimony of Alan C. Wigham.)

Q. And one day from Watsonville to Monterey?

A. That's true. All mail generally goes out in the late afternoon.

Q. Now, this next exhibit, Defendant's E, letter dated July 26, 1954, from Mr. Wigham to Ordinary Underwriting in San Francisco, says:

"Thank you for your advice regarding aviation premium. This detached agent now writes that the prospect is interested in Family Income with Whole Life Paid-Up at age 85 and asks the amount of extra aviation premium on the term element. This, we presume, will differ from that of the permanent insurance. Will you again give us your advice? The prospect is interested in \$5,000.00 on the above plan."

That letter was dated July 26, 1954. You wrote that, Mr. Wigham? A. Yes.

Q. In there you mentioned that this detached agent now writes. Do you have in your file or have you been able to find, any letter from Mr. Price to you about that time regarding that Family Income provision?

A. I wonder if you would ask that question again, Mr. Walsh.

Q. Have you been able to find any letter that Mr. Price wrote to you about the Family Income feature? [147]

A. No, I have nothing in my file other than your file, which you have. I wouldn't recall any other information in this.

(Testimony of Alan C. Wigham.)

Q. Well, I have the complete file and I have not been able to find anything.

A. It asks here what the rate would be on family income, so this would be the first letter, and generally there is a reply telling what the rate would be from the head office.

Q. Would you say, then, that on or about July 26, 1954, was the first time anything came to your knowledge about Mr. Grant being interested in a Family Income feature?

A. That would be the first letter.

Q. Yes. And at that time, so far as you know, the amount of permanent insurance that he was interested in was only \$5,000.00 still?

A. \$5,000.00, the amount stated.

Q. Yes, thank you. Tell me, Mr. Wigham, why did you have to write to San Francisco to try and find out what the extra annual aviation premium was?

Mr. Boyle: Objection, Your Honor.

The Court: Same ruling.

Mr. Boyle: Incompetent, irrelevant and immaterial, calls for the conclusion of the witness, it is argumentative, it is not binding on the plaintiff, self-serving declaration.

The Court: Same ruling and I will reserve my ruling on it.

The Witness: Well, I wrote because we have no authority, [148] and in this particular case it is not in the rate book, which is very, very thorough, and

(Testimony of Alan C. Wigham.)

as a matter of fact, I didn't think the Company would entertain the risk at all.

Mr. Walsh: Q. You find in the current rate book at that time any rate quoted on a crop duster?

A. No.

Q. With reference to Defendant's Exhibit F, letter dated July 30, 1954, from Mr. Svendsen to Monterey——

Mr. Walsh: Oh, pardon me. I am a little out of order. The next one is Defendant's Exhibit D, a letter of July 20, 1954, from Mr. Svendsen to Monterey.

Q. By the way, Mr. Wigham, you have received this letter, have you? A. Yes.

Q. And when you received it, was any of that underlining or handwriting on it?

A. Well, this "make copy" up here looks like my writing, very much like my writing.

Q. That was made after you received the letter?

A. Yes.

Q. But at the time you received it, there was nothing but the typewritten letter, is that correct?

A. That's all.

Mr. Walsh: I should like to read this, if Your Honor please. This is a letter dated July 20, 1954, Defendant's [149] Exhibit D:

"Thank you for your letter of July 15th to which you attached aviation questionnaire Form 036 Aer. 6. As previously requested in your July 6th letter, it has been determined that we can consider your prospect for insurance with the basic extra annual

(Testimony of Alan C. Wigham.)

aviation premium of \$20.00 per thousand. The aviation questionnaire form you sent us in connection with the trial application will suffice if you complete an application within the next week or ten days. We suggest, therefore, that if our tentative offer is acceptable, that you complete the application, arrange for a medical examination between Mr. Grant and one of the authorized examiners in your territory, and order the mercantile report in the usual manner. This must not be construed as a promise to issue, as we can make no definite offer until we have viewed the completed papers. If an application is submitted, please refer to this correspondence.

“We are returning herewith the trial application for whatever disposition you care to make of it.”

Q. Now, on this letter you say you wrote “make copy”? A. Yes.

Q. And then what else appears on there that you caused to be made, if anything?

A. I didn't do it directly, but the clerk would have followed [150] an office procedure of charging it out to Mr. Price and stamping it, “Please return this letter with reply by July 31st.”

Q. Did you cause that letter to be sent to Mr. Price in Watsonville? A. Yes, I did.

Q. And by that stamp and writing that you have just mentioned, that was requested that Mr. Price return it when? A. By July 31st.

Q. Thank you. And did you receive it back from Mr. Price?

(Testimony of Alan C. Wigham.)

A. I couldn't answer that question. Ordinarily I can tell you that the girl, when you see the written cross, there is a cross there, that means that they have had a reply, but she doesn't state whether it is before July 31st or afterwards. I wouldn't know about that.

Q. But this letter that I have came out of your file, did it not? A. That's right.

Q. Thank you. Now, so far as you were concerned on that date of July 20th, you did not know that Mr. Grant was interested in anything more than \$5,000.00 in insurance, is that correct?

A. Only in the amount that is stated there, because that was the amount that had been mentioned by Mr. Price.

Q. Yes. And still nothing is said about the Family Income feature, correct?

A. That's right. [151]

Mr. Walsh: I call Your Honor's attention to Defendant's Exhibit E, letter from Mr. Wigham to Ordinary Underwriting in San Francisco, re Trial Application, Peter Grant:

"Thank you for your advice regarding aviation premium. This detached agent now writes that the prospect is interested in Family Income with Whole Life Paid-Up at 85 and asks the amount of extra aviation premium on the term element. This, we presume, will differ from that of the permanent insurance. Will you again give us your advice? The prospect is interested in \$5,000.00 on the above plan."

(Testimony of Alan C. Wigham.)

Q. You wrote that letter, did you, Mr. Price?

A. Yes—Wigham.

Q. Pardon me, Mr. Wigham.

The Court: We might take the morning recess for ten minutes.

(Recess.)

Mr. Walsh: Q. Referring to Defendant's Exhibit F, letter dated July 30, 1954, from Jonas Svendsen, Chief Underwriter, Metropolitan, to Monterey, did you receive that letter, Mr. Wigham?

A. Yes.

Q. Now, when you received it, did it have any of the underlining or any of the handwritten notations on it?

A. Well, the handwritten notations are mine.

Q. No, I am talking about when you received the letter.

A. No, there was no underlining on it or no writing on it. The letter was received as is.

Mr. Walsh: All right, fine. Your Honor, may I speak to counsel for a moment?

(Conversation among counsel out of hearing of the reporter.)

Mr. Boyle: Yes, subject to my objection, of course, you may put it in.

Mr. Walsh: If Your Honor please, I am coming to a part of something that Mr. Wigham wrote in his handwriting, and in the deposition of Mr. Wigham, page 6, lines 18 to 22, the reporter, by the very nature of the thing, the thing that was read, could not get it exactly right, and we have

(Testimony of Alan C. Wigham.)

asked that the deposition be corrected accordingly. When the time comes and I ask Mr. Wigham the question, I will have to show the reporter this correction so that he can copy it correctly.

Referring to the deposition of Mr. Wigham, page 6, lines 18 to 22, inclusive, this is the correction, after the word "yes", and to the end of the wording, it should read as follows:

"\$20.00 for Life Paid-Up at 85 or other plans except Family Income.

"For Family Income \$40.00 per \$1,000.00.

"With \$1,000.00 and \$20.00 per month \$60.00 per \$1,000.00. [153]

"Better stick to a straight plan of insurance—no Family Income."

Counsel has kindly stipulated that that correction may be made in Mr. Wigham's deposition subject to any objection that he may have.

Mr. Boyle: So stipulated, Your Honor.

Mr. Walsh: Q. Now, coming back to the defendant's exhibit F, letter from San Francisco from Mr. Svendsen to Monterey dated July 30, 1954:

"We have your letter of July 26th informing us that you would like to know the extra aviation premium on the term element in connection with Family Income Whole Life Paid-Up at age 85 Plan. In this regard we refer you to page 661 of the current Rate Book. At the bottom of the page, wherein it indicates that if a policy on the Family Income benefit is applied for, providing \$10.00 per \$1,000.00 monthly income, the basic extra annual

(Testimony of Alan C. Wigham.)

aviation premium will be twice that quoted; and if a policy is applied for with a \$20.00 per \$1,000.00 monthly income, the basic extra annual aviation premium would be three times the amount quoted. And if the application is for the family income benefit to age 65, providing \$10.00 monthly income per \$1,000.00, the basic extra annual aviation premium would be between two and three times the basic amount quoted. We trust [154] this answers your inquiry. Jonas Svendsen, Chief Underwriter."

Q. Mr. Wigham, you received that letter, you testified, and below that there is some handwriting. Is that your handwriting?

A. Yes, definitely.

Q. Now, would you read that to us, please?

Mr. Boyle: Now, if Your Honor please, may we at this point interpose an objection?

Mr. Walsh: I have a copy here.

Mr. Boyle: Simply that my objection may be stated, it is self-serving declaration, conclusion of the witness, hearsay, not binding on the plaintiff in this action, or the deceased, not communicated to the deceased or to Mrs. Grant, improper foundation.

The Court: I think your objection is well taken, but I will let him answer it.

Mr. Walsh: I will connect it up.

The Court: Subject to that same ruling I made.

Mr. Walsh: Q. Will you read that, please?

A. "\$20.000 for life paid-up at 85 or other plans except family income.

(Testimony of Alan C. Wigham.)

“For family income \$40.00 per \$1,000.00.

“With \$1,000.00 and \$20.00 per month \$60.00 per \$1,000.00.

“Better stick to a straight plan of insurance—no family income.”

Q. Can you tell us why you wrote that on the letter? [155]

Mr. Boyle: Same objection, Your Honor.

The Court: The same ruling.

The Witness: In the first place, I was surprised the Company would make an offer at all; it wasn't in the rate book, and just previously I had read an article in the Saturday Evening Post by a crop duster where he was a sole survivor out of a group, and the article stated that he had the most hazardous occupation. We declined certain hazardous occupations, and this looked to me like an exceptionally hazardous one, so I put that notation down that if he had a chance to get insurance at all, we'd better stick to a straight life plan, because if there was anything compounding the risk, maybe, any health or any other risk to be entertained, maybe over-weight, if it compounded the risk, then the agent would have to go without family income, because if he was rated, we didn't have a family income on, say, a special class policy that normally a rating list would get.

Q. Well, now, was there another purpose in writing that notation on there?

A. Well, I wanted to have him make sure about the extra aviation premium and the extent of it.

(Testimony of Alan C. Wigham.)

Q. Did you send that letter?

Mr. Boyle: If Your Honor please, if we may move to strike, the same objection stated to the last one.

The Court: Yes. [156]

Mr. Walsh: This is preliminary, Your Honor. I will connect it up.

The Court: Yes, I think it had better be understood this objection runs to all this line of testimony.

Mr. Boyle: Yes, sir.

Mr. Walsh: Q. Did you send that letter to Mr. Price? A. Yes.

Q. Now, speaking here as of this time, July 30, 1954, of the family income benefit, can you tell us whether that is separate and distinct from the insurance, the permanent insurance?

A. Yes, the letter was on the aviation premium, extra aviation premium, and I just wanted to make sure that he knew he would have that additional premium for the aviation in addition to the insurance.

Q. So at that time, so far as you knew, it was still \$5,000.00 of permanent insurance that they were asking?

A. That's all the previous letters had mentioned or entered into, was \$5,000.00.

Q. And the premium on that, of course, would be in addition to this aviation risk?

A. That's right.

Q. Do I understand, then, from your testimony

(Testimony of Alan C. Wigham.)

that the family income feature only of the policy, based on the—I will withdraw that question.

Do I understand from your testimony, then, that the premium [157] on the aviation risk only, where a policy is applied for for permanent insurance, plus the family income feature, the basic aviation premium would be \$40.00 per thousand per year if they are asking for an income of \$10.00 per \$1,-000.00 per month? A. That's right.

Mr. Boyle: In connection with that, may we also have an objection that it is not the best evidence. I assume that the Metropolitan Company has a rate book with complete instructions to the agents here.

The Court: Yes, your objection will be noted and it will be stricken by the Court if I determine your objection is well taken.

Mr. Walsh: I call the Court's attention to Defendant's Exhibit G, letter dated August 20, 1954, from Alan C. Wigham to Claim Division of Metropolitan. Did you write that letter, Mr. Wigham?

A. Yes.

Q. Thank you.

Mr. Walsh: This refers to Policy No. 20158526-A, Peter Grant.

Q. Now, the handwriting on there, which says, "Died August 13," is in pencil; is that yours?

A. No.

Q. The typewritten part of the letter reads as follows: [158]

"A claim will follow on the above. We attach a newspaper story. Our agent advises that it is to be

(Testimony of Alan C. Wigham.)

determined if direct cause of death is from injuries or poisoning from the load carried. He also states that a neighbor advised the claimant that double indemnity would never be paid and had her go to an attorney. We hope she is not entertaining unnecessary expense. We should also attach an application taken on this life. The application was taken several days before the loss and the applicant stopped at the doctor's office to arrange a medical. We learned too that the wife of the applicant gave our agent a check for \$53.36 and asked that he hold it a day or two. The check has been returned and the deceased's wife understands that the Company is on no risk for this application."

Now, with that letter, Mr. Wigham, did you send this application, Plaintiff's No. 1?

Mr. Boyle: To the letter, the further objection in addition to those stated, that it is hearsay and self-serving.

The Court: Yes, I am sure it is, but I will entertain it under the same ruling I have heretofore made.

The Witness: I wouldn't recall unless the letter said it was attached.

Mr. Walsh: Q. Unless what?

A. The letter itself said it was attached, that it would have [159] been attached. But I wouldn't recall from memory. If the letter said it was attached, it would have been attached—otherwise we would have had a letter back that they didn't receive it.

(Testimony of Alan C. Wigham.)

Q. Would you say that this would be a notice to the Company by you that the insured had died, that is, the insured under the other policy?

A. Yes, it was a notice that he had died under the policy in force, and then I asked here, "Also attached application to this life." So that application was on the back of that letter.

Q. I see. And this is the only application you knew of, and I am showing you Plaintiff's Exhibit No. 1? A. That's right.

Mr. Walsh: That's all, Mr. Wigham, but just a moment, because counsel probably has some questions to ask you.

Mr. Boyle: No questions, Your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Walsh: Mr. Price.

The Clerk: Mr. Price has been sworn.

GEORGE PRICE

recalled as a witness, being previously sworn, resumed the stand and testified further as follows:

Direct Examination

By Mr. Walsh: Q. Mr. Price, did you ever tell Mr. Grant [160] that \$53.36 was the full first premium in connection with this application, Plaintiff's Exhibit No. 1? A. No.

Mr. Boyle: Your Honor—

The Court: The answer may be stricken.

Mr. Boyle: —I object to the question on the

(Testimony of George Price.)

ground that it is not the best evidence; it is an attempt to vary a written contract by oral testimony, and it is leading.

The Court: Well, certainly the insured isn't here to dispute anything this man says. I think I should sustain this objection. Of course the question is leading. But I will let him answer it with the reservation that I will strike it if I determine later to do so.

Mr. Walsh: The answer may stand, then?

The Court: Yes.

Mr. Walsh: May Your Honor indulge me in asking some questions in the nature of leading questions for the purpose of shortening time?

The Court: Well, I think I had just as well let you.

Mr. Walsh: Q. Mr. Price, did you ever tell Peter Grant that the Company would insure him?

A. No.

Mr. Boyle: Again self-serving, Your Honor, hearsay.

The Court: Yes, same objection, same ruling.

Mr. Walsh: Q. Did you ever tell Peter Grant that the [161] Metropolitan would insure him on his business? A. No.

Mr. Boyle: Same objection, Your Honor.

The Court: Yes. Let it be understood that I will recognize your objection to these matters and permit the testimony, subject to the objection. [162]

Mr. Walsh: Q. Mr. Price, did you ever tell

(Testimony of George Price.)

Peter Grant that the Metropolitan Life Insurance Company would insure him for any amount?

A. No.

Mr. Boyle: Same objection.

The Court: Same ruling.

Mr. Walsh: Q. Did you ever tell Mr. Grant that the Metropolitan Life Insurance Company would insure his life on any particular plan of insurance?

A. No.

Mr. Boyle: Same objection.

The Court: Same ruling.

Mr. Walsh: Q. I will show you defendant's Exhibit D, a letter dated July 20th, 1954, from Mr. Svendsen to the Monterey office. Will you take a look at that, please?

Did you receive that from Mr. Wigham?

A. Yes.

Q. Did you show that letter to Mr. Grant?

A. Yes, sir, at the time the application was written.

Mr. Boyle: Your Honor, may this witness's answers be limited directly to the questions?

The Court: Yes.

Mr. Boyle: We move to strike the answer as hearsay, self-serving, and not responsive.

The Court: The motion to strike will be taken under [163] advisement and passed on at the time of the other rulings.

Mr. Walsh: I will agree that it may all go out except the answer "yes".

Mr. Walsh: Q. Now, there is some underlining

(Testimony of George Price.)

Grant talked about? A. Yes.

Q. Now, was there anything in the current rate book at that time which would show the basic extra aviation premium for a crop duster? A. No.

Mr. Boyle: Objection.

The Witness: None.

Mr. Boyle: Not the best evidence.

The Court: Well, I will let him answer it. I will consider this record that you have a motion to strike all of this testimony that has been given in connection with his statements to Mr. Grant.

Mr. Walsh: Q. I show you plaintiff's Exhibit 1, the application dated August 11, 1954, part A, number 18, where it says, "premium payable". You put a cross, did you, in the little box opposite "monthly" for premium payment?

A. Yes, sir. [166]

Q. And at whose request did you so mark the application?

A. At the request of both Mr. and Mrs. Grant.

Mr. Boyle: May I follow that just one moment, Mr. Walsh? To what are you referring?

The Witness: Monthly premium basis.

Mr. Walsh: How the premium was to be paid.

Mr. Walsh: Q. Now, also under 18 on part A it says, "classification applied for", and there are several classes: ordinary, intermediate, special class, special class B.

I will show you that, Exhibit 1.

When you mark any of those things where there is a little square, what sort of mark are you sup-

(Testimony of George Price.)

posed to put in there? A. A cross.

Q. A cross? A. A cross.

Q. You have the cross in front of what classification? A. Intermediate.

Q. There is also a mark on there, is there not, in the square in front of "ordinary". What kind of a mark is that?

A. An error mark. It is just one line, and I realized it was an error, and I——

Q. (Interposing) It is one line. It isn't a full cross? A. No.

Q. How did you happen to put that in there?

A. Error. [167]

Q. It was an error? A. Yes.

Q. Was it your intention at that time to mark it "intermediate" or "ordinary"?

Mr. Boyle: Objection. Self-serving and hearsay.

The Court: Yes, it is, but I will let him answer, but I will let him answer it with the same reservation I have made heretofore.

A. The only reason I marked it "intermediate" is, I felt——

Mr. Walsh: Q. No, that isn't the question. The question is—will you read the question to him, please?

(Question read by the Reporter.)

A. I felt he may be rated "intermediate" and not "ordinary".

Mr. Walsh: Q. Why did you leave that slant mark in the box in front of "ordinary"?

Mr. Boyle: Same objection, Your Honor.

(Testimony of George Price.)

The Court: Same ruling.

A. Company's rules are you cannot erase anything from an application.

Mr. Walsh: Q. Why did you classify the applicant as "intermediate"?

Mr. Boyle: Same objection.

The Court: Same ruling.

A. Just a matter of judgment, personal judgment. I wasn't sure. [168]

Mr. Walsh: Q. Oh, by the way, I am referring to Plaintiff's Exhibit 1 on the back part where it says "report of inspection". There is a question, "give information available as to amount and source of applicant's annual income", and you have down here, "\$15,000".

From whom did you obtain that information?

A. From Mr. Grant.

Q. Thank you. Now, Mr. Price, a whole life insurance means what insofar as payment of premiums is concerned? A. A whole life.

Q. Does it mean that if the applicant has a policy of insurance issued he would have to pay the premiums so long as he lived? A. Yes.

Q. And is any part of whole life insurance payable prior to the death of the insured?

A. No.

Q. Payable only upon death?

A. Yes, sir.

Q. The family income feature of a policy of whole life with family income, what is the family income feature, what type of insurance is that?

(Testimony of George Price.)

A. It is added family protection on a depreciating term. From the day he buys it, it depreciates during the period of twenty years. At the end of twenty years it ends. [169]

Q. In other words, you have a combination of whole life permanent insurance payable only upon death, plus decreasing term insurance, is that it?

A. Yes, sir.

Q. Was Mr. Grant—withdraw that. Did you ever quote to Mr. Grant during his lifetime a premium of \$400 annually for a whole life family income policy?

A. Words were spoken of an annual basis, but primarily they were interested in a monthly basis.

Q. Now, the premium for whole life family income for a man without an extra hazardous risk could be found in the rate book, could it not?

A. Yes.

Mr. Boyle: Same objection. Self-serving.

The Court: I think it is immaterial.

Mr. Boyle: Not the best evidence.

The Court: I think it is not material, but I will consider your same objection.

Mr. Walsh: But the aviation—the basic premium for the aviation hazard could not be found in the rate book at that time? A. No, sir.

Q. And did you ever receive from the company any information about that extra aviation premium quoted on a monthly premium basis? [170]

A. No, sir.

Mr. Walsh: I am almost through, Your Honor.

(Testimony of George Price.)

Mr. Walsh: Q. Now, when you called on Mrs. Grant, now Mrs. Kenny, on August 14th, the day after Peter Grant's death, and gave her back the check did you ask her to sign any papers?

A. I can't recall asking her to sign any papers. I did ask her for the receipt and she said it wasn't available, she couldn't find it. Now, whether I asked her to sign at that moment I can't recall.

Q. Did you at that time or at any time on August 14th of 1954 say to Mrs. Grant, "Well, if you will sign these we will advance you money"?

A. Oh, I beg your pardon, I believe that Mr. Caruso was with me. Now I am recalling. I believe Mr. Caruso was with me. He was at that time the assistant—or he was the——

Mr. Walsh: Just a moment. Will you read the question, please?

(Question read by the Reporter.)

A. I told her this——

Mr. Walsh: Q. You can answer that yes or no.

A. Yes. We had a release form, and I gave her back the check and I asked her for the original receipt that I advanced, which she said in her sorrow at that time she couldn't find it and didn't know where it was, and she was very much upset; and I didn't insist upon retrieving the receipt any further, and I [171] asked her if she would sign a release statement, and I believe she said she wouldn't sign anything.

Q. You asked her if she would sign what?

(Testimony of George Price.)

A. We have a release form and she said she wouldn't sign anything.

Q. Did you say to her at that time or any time on August 14th, 1954, that you would advance her money?

A. I didn't say anything about advancing anything. Nothing was spoken of except the check that I gave to her. There was nothing else. I had no power to advance her any money.

Now, whether this had anything to do with the old policy I can't recall, because we are in the habit of advancing money on old policies.

Q. I see. When you went there on August 14th, you also had in mind the fact that there was a previous policy in force? A. Right, right.

Q. But any question of advancing money had nothing to do with this particular application?

A. None whatsoever. We are in the habit of advancing money to people who are in any type of need on old insurance.

Mr. Walsh: That is all.

The Court: I would like to ask you one question.

A. Yes, sir?

The Court: Where is that release that you had prepared for her to sign? [172]

A. Well, I don't have that with me. We have duplicate copies.

The Court: Do you have a duplicate with you?

A. No, not with me.

The Court: Was it all filled out with her—for her signature?

(Testimony of George Price.)

A. That I can't say, Your Honor. I don't recall.
The Court: That is all.

Mr. Boyle: We will want to cross examine Mr. Price, of course, Your Honor.

The Court: Well, I thought maybe we might complete it before the noon recess, but we had better recess. Recess until two o'clock.

(Recess until 2:00 o'clock p.m.) [173]

Thursday, June 20, 1957—2:00 o'clock p.m.

Mr. Walsh: Mr. Price, will you come forward, please?

Your Honor, I want to ask Mr. Price a few more questions.

The Court: All right.

GEORGE PRICE

a witness on behalf of the defendant, on the stand at the time of recess, resumed the stand and testified further as follows:

Direct Examination—(Resumed)

Mr. Walsh: Q. Mr. Price, going back to August 14th of 1954 when you called at the residence of Mrs. Grant, now Mrs. Kenny, and returned the check to her, I understand you asked for the receipt; she said she didn't have it; and then you—

Mr. Boyle: Misquotation of the evidence.

The Court: Yes.

Mr. Boyle: She did not say she did not have it.

The Court: I will remember what she said.

(Testimony of George Price.)

Mr. Walsh: Q. All right, what did she say about the receipt?

A. Said she couldn't find it at present; didn't know where it was.

Q. Now, you said you asked her to sign some other papers?

A. Just a form showing I had returned whatever money by cash or check she gave me, and nothing else. [174]

Q. You mentioned that that was a release?

A. Mentioned it was a release form for any moneys that was given to an agent. It is a company requirement, when you return any money, you have a receipt showing that you returned that money to the person who gave it to you.

Q. You did not offer her any money to sign a release of any claims?

A. Oh, no, I had no money to give her.

Q. Is it a requirement of the company that when you return money, that you must have something to show for it?

A. Yes, sir.

Q. And was that the purpose in asking her to sign it?

A. That was the purpose, yes.

Mr. Walsh: That's all.

Mr. Boyle: Very well.

Mr. Walsh: Oh, one further thing, if you please.

There is a stipulation, Mr. Brauer, in your letter to me of May 21, 1957.

Counsel for the plaintiff has stipulated, Your Honor, that if the autopsy surgeon were called he would testify that Peter Grant was approximately

(Testimony of George Price.)

six feet two inches and weighed about 225 pounds on August 13, 1954, and that they will reserve the right, however, to object to the admissibility of this evidence on the ground that it is neither material nor relevant. So I should like to put into evidence, as though we [175] had called the autopsy surgeon, the autopsy on Peter Grant the same day as his death.

Mr. Boyle: So stipulated.

Mr. Walsh: And that at that time he was approximately six feet two and weighed about 225 pounds. And, of course, that would be without his clothes.

Mr. Boyle: The stipulation does not say that.

The Court: Well, I think it is in evidence that it was about his weight, by a doctor. I can see no reason for delaying the trial on this.

Mr. Walsh: Well, I think without having to bring the autopsy surgeon all the way from Watsonville, I think we all know it is customary when an autopsy is performed that the body is weighed without any clothes, and measurements are taken.

Mr. Boyle: Well, you see, Your Honor, the stipulation is framed in the terms of the autopsy report itself, which says, "approximately six feet two and about * * *," indicating that the body was not, in fact, weighed, but that it was an estimate.

The Court: Well, can you stipulate to it?

Mr. Boyle: Yes, in those terms of our written stipulation.

Mr. Walsh: Well, the terms "was approximately

(Testimony of George Price.)

six feet two and weighed about 225 pounds." [176]

The Court: Stipulation may be received.

Mr. Walsh: Thank you.

Mr. Boyle: Anything further, Mr. Walsh?

Mr. Walsh: No, I am through with the witness.

Mr. Boyle: May it please your Honor, on May 17, 1956, the plaintiff made a motion for production, inspection and copying of documents, writing, memoranda, and all communications in the possession of the defendant pertaining to the application of Peter Grant dated August 11, 1954, for a life insurance policy. Now Mr. Price states that he presented some form which he describes as a release, and he wanted Mrs. Grant to sign it, on August 14th.

Do you have that, Mr. Walsh?

Mr. Walsh: No, I don't. The first I heard of that was when Mr. Price testified—or rather, the first I heard of it was when Mrs. Kenny testified.

Cross Examination

Mr. Boyle: Q. Mr. Price, do you have that among your papers?

A. It is an ordinary—it is just a simple form. I don't have any—we can—it's just an ordinary form that the company requires when we give any money back, or take any money.

Q. Mr. Price, the question was, do you have that paper among your possessions? [177]

A. I don't have any papers of that kind among my possessions. It is just an ordinary form——

(Testimony of George Price.)

The Court: Q. You don't have it any more?

A. Huh? Well, it's——

Q. Just answer the question.

A. No, I don't.

Mr. Boyle: Q. What did you do with that paper?

A. Just a form we carry around with us. We have dozens of them.

Q. Well, that particular paper that you——

A. It wasn't a particular paper. It was a release form of moneys that we give anybody when we deliver a check or money. It is simply a form stating we delivered that money to them and we want a receipt for the money we gave to them.

Q. Mr. Price, when you couldn't get Mrs. Grant to sign that paper, did you destroy that paper?

A. Well, I didn't do any more about it, but left the house and put it back with all my other forms that I have. There was nothing written on the form. It is just a plain, ordinary office form, just like many other forms we have. It had nothing, as far as the company—there was no printed matter on it.

Q. Was there any written matter on it?

A. No written matter on it at that moment.

Q. Well, hadn't you written something into that form? [178]

A. No, I hadn't written anything. I would write it—if she signed her name I would fill it out in front of her.

Q. Now, there's another paper that has been mentioned here, Mr. Price, called a trial applica-

(Testimony of George Price.)

tion, which you have signed, sometime in the latter part of June, 1954. After that trial application left your hands did it ever come back to your possession?

A. Not to me, personally, that I know of.

Mr. Boyle: On the trial application can we stipulate——

Mr. Walsh: The trial application, the correspondence shows——

May I have the exhibits?

Defendant's Exhibit G, letter of August 20, 1954, from Mr. Wigham—no, I am sorry, that's the wrong one. It's Defendant's Exhibit D, letter from Mr. Svendsen, Monterey, dated July 20, 1954, and it states (reading):

"We are returning herewith the trial application for whatever disposition you care to make of it."

I informed Mr. Brauer some time ago that we had made a search for that, and apparently it has been destroyed or was lost, and I believe Mr. Wigham testified in his deposition that he probably sent it to Mr. Price; that it would have been of no further use in the district office. Mr. Price searched for it and was unable to find it. [179]

Mr. Boyle: Very well.

Q. Mr. Price, I will show you Exhibit 1. Now, that trial application which you took in the latter part of June, 1954, was it on the same type of form as this one? A. Same type of form.

Q. Now, is it not also true that some place on that trial application you wrote in ink, "Trial"?

(Testimony of George Price.)

A. Yes.

Q. At the time you took that trial application did you ask Mr. Grant for a premium?

A. No.

Q. I direct your attention to Section 18 of Exhibit 1, and particularly to those boxes opposite these words: "Classification applied for." On that trial application did you make any marks in any of those boxes?

A. To the best of my knowledge I would say no.

Q. Now, Mr. Price, I think you testified this morning—correct me if I am wrong—that the first time that a policy in the sum of \$10,000 was on August 10, 1954?

A. I said that.

Q. Is that true?

A. I am quite sure.

Mr. Boyle: May the witness have his deposition, Your Honor?

Q. Mr. Price, do you recall the 6th day of July, 1956, when [180] your deposition was taken in the offices of Hudson, Wyckoff & Parker in Monterey?

A. I recall being there.

Q. And at that time were you sworn by a Notary Public?

A. Yes.

Q. And during the proceedings that afternoon did Mr. Brauer put certain questions to you?

A. Yes, sir.

Q. And did you answer those questions as they were put to you?

A. I believe I did, the best of my recollection.

Q. And were the questions and the answers transcribed by a reporter, such as is present here?

(Testimony of George Price.)

in the court? A. Yes.

Q. Will you look at your deposition in your hands, at page 19, line 21 through line 9 on page 20, and will you please read to yourself the questions and the answers?

Mr. Walsh: Pardon me, Counsel. Is there a page 19 of the deposition? Mine shows——

Mr. Boyle: Page 18, possibly. Were there some skips in the page?

A. Yes, this is an error here some place.

Q. Well, I direct your attention to the page labeled both 18 and 19, and the line beginning 19 and continuing through the next page, which is No. 20, through line 9.

A. (Witness peruses deposition.) [181]

Q. Have you finished reading it, Mr. Price?

A. I have read it.

Q. Now, on that occasion was this question put to you, beginning page 18-19, line 21, as follows (reading):

“Q. I see. And in the policy that he was then applying for, the lump sum was \$10,000?”

Was that question asked of you?

A. It was asked, yes, sir.

Q. And did you give the answer, “Yes, sir”?

A. That’s right.

Q. And then was this question asked (reading):

“Q. Did you explain that to them at that time?”

A. Yes.

Q. And did you give this answer: “Yes, sir, thoroughly explained it to him.”?

A. Explained what?

(Testimony of George Price.)

Q. Did you give that answer: "Yes, sir, thoroughly explained it to him."?

A. Probably.

Q. Was that your answer to the question put?

A. What was the question put?

The Court: You just read it there. Look at it and see.

The Witness: All right.

Mr. Boyle: Q. Was the question put to you (reading):

"Did you explain that to them at that time?"

A. Is that about the family income you are speaking of?

Q. I am simply reading your deposition. Was that question put to you? A. Yes.

Q. And did you answer that question as follows (reading):

"A. Yes, sir, thoroughly explained it to him."?

A. Yes.

Q. Is that your answer? A. Yes.

Q. Then was the question put to you (reading):

"Had he at any prior occasion mentioned \$10,000 to you, that he desired a \$10,000 policy?"

Was that question put to you? A. Yes.

Q. (reading) "Yes, he had."

Did you make that answer? A. Yes.

Q. Was this question put to you (reading):

"Q. When did that occur?"

Were you asked that?

A. In the interim of the conversation we had, it says here.

(Testimony of George Price.)

Q. Were you asked the question: "When did that occur?"

A. During the conversation we had here, it says here.

Q. I am just asking you, Mr. Price, if that particular question was put to you. [183]

A. Yes.

Q. Now, did you answer that question as follows (reading):

"A. That occurred in the interim of this conversation we had. I mean from the time I knew him, he expressed a desire to buy \$10,000, but he said he couldn't afford very much. That is the reason he wanted term. I showed him that he could buy a low cost straight life policy combined with term, which would serve the same purpose as a \$5,000 policy that he originally spoke of."

A. Yes.

Q. Did you make that answer?

A. Yes.

Q. Now, Mr. Price, isn't it a fact that from the time you first talked insurance to Peter Grant, that he expressed a desire for a \$10,000 policy?

A. Offhand.

Q. Now, isn't it also a fact that from the first time you met Peter Grant and discussed insurance with him he asked you for a term policy?

A. He did.

Q. And what did you tell him in respect to a term policy?

(Testimony of George Price.)

A. Because of his occupation I told him that he couldn't buy term insurance.

Q. And then you suggested to him that he buy whole life [184] insurance, isn't that right?

A. At that time, yes, sir.

Q. Now, Mr. Price, correct me again if I am wrong. Did you testify this morning that the first time a family income policy was mentioned was on the evening of August 10, 1954?

A. I can't recall exactly. That's too long ago.

Q. Well, did you so testify this morning?

A. I might have said that, but surely I can't say.

Q. Are you now changing your testimony?

Mr. Walsh: No, he didn't testify to that. He didn't testify to that.

Mr. Boyle: May we have the correct testimony?

Q. My notes are wrong, then?

A. I can't—

Q. When was family income, then, first mentioned? A. It was later.

Q. Later than what?

A. Later than the proposal of \$5,000. A family income was mentioned much later.

Q. But the family income was first mentioned by you, wasn't it, Mr. Price?

A. Later, yes, sir.

Q. And family income was mentioned to you—or mentioned by you to Peter Grant long before August 10, 1954, wasn't it?

A. I can't recall exact dates at all. [185]

Q. Mr. Price, I will show you Exhibit E. Now,

(Testimony of George Price.)

does that letter refresh your memory, Mr. Price?

A. Yes, it does.

Q. In other words, at some time before the 26th of July, 1954, you talked with Peter Grant about a family income policy, didn't you?

A. Quite evidently.

Q. Your answer, please? A. Yes.

Q. Now, Mr. Price, it is a fact, is it not, that you were the first one who mentioned family income to Mr. Grant? A. Yes, sir.

Q. Until you explained to him what family income meant the man had never heard of it in his life, had he?

A. I can't testify to that.

Mr. Walsh: That would be calling for his conclusion and opinion on something he knows nothing about. Object to it.

The Witness: I can't say on that. He told me——

Mr. Walsh: Just a moment, please, Mr. Price.

The Court: He says he can't say that; he doesn't know. So——

Mr. Walsh: All right.

Mr. Boyle: Q. Well, Peter Grant had never asked you about it, had he, until you mentioned it?

A. But you mentioned had he—— [186]

The Court: Just answer the question. Don't argue with counsel.

The Witness: I beg your pardon, sir?

Mr. Boyle: Q. Peter Grant had never asked you about family income until you mentioned it to him? A. Correct.

(Testimony of George Price.)

Q. Mr. Price, I will show you Plaintiff's Exhibit D.

Counsel, that is letter dated July 20, 1954.

On what date did you receive that letter from your district office?

A. Approximately a few days later, say the 23rd or so.

Q. And what date did you return it to your district office?

A. I can't recall that at this moment.

Q. The instructions on the letter read, "Reply before 7/31. Return this letter with reply."

Is it your recollection that you complied with that instruction? A. Yes, sir.

Q. I will show you Defendant's Exhibit F, a letter dated July 30, 1954. Referring to the date of that letter, about when did you receive this letter from your district office?

A. It is usually within one or two days. It is dated July 30th. Has to come from San Francisco to Monterey and then to me, and en route it would take at least three or four days.

Q. Now, you showed this letter to Mr. Grant?

A. Yes, sir.

Q. Before August 10, 1954, did you not?

A. Yes, sir.

Q. As a matter of fact you showed this letter to him early in August, '54? A. Yes, sir.

Q. Mr. Price, on the evening of August 10, 1954, when you were at the Grant home, did you have your rate books with you? A. Yes, sir.

(Testimony of George Price.)

Q. Did you consult them? A. Yes, sir.

Q. Did you also have in mind the instructions contained in the letter of July 30, 1954?

A. Yes.

Q. In respect to the extra premium for the family income benefit on an aviator?

A. Yes, sir.

Q. And did you also have in mind the letter of July 20, 1954, which says (reading):

“It has been determined that we can consider your prospect for insurance with a basic extra annual aviation premium of \$20.00 per \$1,000.”

Did you have that in mind on August 10th?

A. I had that in mind, sir.

Q. And that evening you made some computations, didn't you, [188] Mr. Price?

A. A few approximate computations.

Q. And after making those computations you asked Mr. Grant for a check in the sum of \$53.36, did you not?

A. Yes, sir.

Mr. Boyle: No further questions, Your Honor.

Redirect Examination

Mr. Walsh: Q. Mr. Price, I show you Plaintiff's Exhibit No. 2, which is the receipt dated August 11, 1954. On the back of that appears some figures. Do you know whose handwriting that is?

A. I couldn't tell you, sir. I don't know whether it is mine or not. I don't know.

Q. Well, can you tell from the——

A. It doesn't look like my numbers.

(Testimony of George Price.)

Q. Doesn't look like your numbers. The figures appear here, "\$15.05, \$53.66," and then a total of \$68.71. Does that mean anything to you?

A. I can't recall, sir.

Mr. Walsh: May I have a word with counsel, Your Honor?

(Discussion between counsel out of hearing of the reporter.)

Mr. Walsh: Counsel just informs me, your Honor, that these figures on the back were written by Mrs. Grant in figuring out the monthly premium of \$15.05, plus \$53.66, making [189] a total of \$68.71.

Mr. Boyle: Mrs. Grant was trying to determine——

Mr. Walsh: I just want to know whether those figures are correct.

Mr. Boyle: Well, the figures are correct. But she had in mind the monthly premium under the policy in force, which was \$15.05.

Mr. Walsh: You mean the policy that had been issued in 1950?

Mr. Boyle: We could put the policy in evidence, if you wish. You will note the monthly premium, \$15.05.

The Court: What difference does it make?

Mr. Boyle: And as a good housewife, she wanted to know how much they were going to pay in insurance every month, so she made the computation.

The premium on the policy then in force, \$15.05, plus the premium on the policy which Mr. Price

(Testimony of George Price.)

was selling, and she just happened to write \$53.66 instead of \$53.36, and then she knew they would have \$68.00 every month to shell out.

The Court: Well, all right.

Mr. Walsh: Q. Did you, or did you not, know at that time, Mr. Price, what the whole first premium would be on the type of policy applied for?

Mr. Boyle: Objection——

A. Not exactly. [190]

Mr. Boyle: Self-serving declaration.

The Court: Yes, it is.

Mr. Boyle: Hearsay.

The Court: I will sustain the objection.

Mr. Walsh: Q. Did you, Mr. Price, see Mrs. Kenny, then Mrs. Grant, make any calculations on the back of that receipt?

A. I can't recall anything she wrote personally.

Q. At the time the application was signed, Plaintiff's Exhibit 1, was that receipt attached to it?

A. Yes, sir, attached to the bottom of it.

Q. Attached to the bottom?

A. To that application.

Q. To the corner of Part A? A. Yes.

Q. And did you fill in that receipt before or after it was detached from the application?

A. After—you mean to sign the application? Did he sign it first?

Q. I will withdraw the question.

The application, Part A, was signed by Peter Grant after he had read it over, isn't that right?

(Testimony of George Price.)

A. That is right.

Q. Then you signed as a witness?

A. Yes.

Q. At that time was the receipt still attached to the [191] application? A. Yes, sir.

Q. All right. And subsequently, when you wrote out the receipt, was it still attached to the application, when you filled in the receipt?

A. It was attached until I received his check.

Q. When you filled in the receipt it was still attached to Part A of the application?

A. That is right.

Q. And after you wrote it out you detached it, and to whom did you give it?

A. Well, I can't recall just who I gave it to, but I just tore it off and, to the best of my recollection, I think I put it on the table—on the coffee table, or whatever they call it.

Q. At that time did either Mr. or Mrs. Grant have that other policy there?

A. On hand? I don't think so, at that moment. I didn't see any other contract there, then. I can't recall exactly.

Mr. Walsh: Maybe we can clear this up. Can I speak to counsel a moment?

(Discussion between counsel out of hearing of the reporter.)

Mr. Walsh: Just trying to save time, Your Honor.

Mr. Boyle: Stipulate, Counsel, if Mrs. Kenny were called [192] to testify she would state it is

(Testimony of George Price.)

her best recollection she wrote on it the night after Mr. Price left.

Mr. Walsh: After he had left?

Mr. Boyle: Yes.

Mr. Walsh: That is all.

Mr. Boyle: No further questions.

The Court: You may step down.

(Witness excused.)

Mr. Walsh: Mr. Svendsen.

JONAS SVENDSEN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

The Clerk: Q. Please state your name and occupation for the record.

A. Jonas Svendsen, chief underwriter, Metropolitan Life Insurance Company.

Mr. Boyle: Q. May I have that name spelled?

A. I don't blame you.

Mr. Walsh: S-v-e-n-d-s-e-n.

Direct Examination

Mr. Walsh: Q. You are an employee of the Metropolitan Life Insurance Company, Mr. Svendsen?

A. Yes, sir.

Q. And in what capacity are you employed?

A. I am the chief underwriter.

Q. At the Pacific Coast head office?

A. At the Pacific Coast head office.

Q. How long have you been chief underwriter there?

(Testimony of Jonas Svendsen.)

A. In the capacity of chief underwriter since September of 1945.

Q. Were you with the Metropolitan before that?

A. Yes, sir.

Q. In what capacity and for how long?

A. I started to work on February 23, 1921, in the capacity of mail boy, and then was put into the underwriting department and worked in various capacities, junior underwriter, right on up right 'til 1945 when I was made chief underwriter.

Q. And how long have you been in the underwriting business?

A. Well, I served about four months, four or five months as a mail boy, and was put into the underwriting department, and I have been there pretty close to 36 years, now, in the underwriting department.

Q. I will show you Plaintiff's Exhibit 1 and ask you to take a look at that. That is a partially completed application signed by Peter Grant, dated August 11, 1954, and signed, actually, on August 10, 1954. Is that a complete or incomplete application?

Mr. Boyle: Objection, Your Honor. The document is the best evidence. It is incompetent, irrelevant and immaterial; [194] self-serving; hearsay.

The Court: The objection will be sustained.

Mr. Walsh: Q. What plan of insurance does that call for?

Mr. Boyle: Objection, Your Honor. The document itself is the best evidence.

(Testimony of Jonas Svendsen.)

The Court: Objection will be sustained.

Mr. Walsh: Q. Mr. Svendsen, does the document, itself, show in ordinary language what plan of insurance is applied for?

Mr. Boyle: Objection, Your Honor—same reason.

The Court: Objection will be sustained.

Mr. Walsh: Q. In the course of your duties as an underwriter, chief underwriter, Mr. Svendsen, if that application had been completed would it have come to your division?

A. That is right.

Mr. Boyle: Objection, Your Honor. Move to strike the answer.

Mr. Walsh: I fail to see the basis of these objections.

The Court: The objection will be sustained. I don't think it is material. I have let the record be encumbered with a great many objections on both sides here that I should have sustained, and now I am going to start to rule the way I think I should rule, without taking them under advisement.

We will go on from there. Go ahead. [195]

Mr. Walsh: May the witness answer?

The Court: No.

Mr. Walsh: Well, Your Honor, we have an issue in this case, put in issue by the plaintiff, through oral testimony that was allowed on the plaintiff's side, evidence went far beyond the matters of negotiations and explanations. I made objection at that time, and the evidence was admitted. Now, if we are not entitled to introduce evidence to present

(Testimony of Jonas Svendsen.)

our side of the case we are precluded from a proper defense of this action.

The Court: I think I have ruled correctly.

Mr. Walsh: Q. Mr. Svendsen,—

The Court: I think a great many of your objections in the final outcome of this case will be sustained, too.

Mr. Walsh: I beg your pardon, Your Honor?

The Court: I think a great many of your objections, as I received them in evidence with reservation, I think your objections will be sustained.

Mr. Walsh: Well, in view of the fact that the evidence is brought in, Your Honor, we have got to produce it now.

The Court: I think I will rule on all these questions from now on the way I see it, and not encumber the record with a lot of objections that I will have to rule on later.

Mr. Walsh: Q. Mr. Svendsen, I will show you Defendant's Exhibit D. That is the letter of July 20, 1954. This letter [196] was sent from your department to the Monterey district office, was it not?

A. Yes, sir.

Q. That was in response to an inquiry about the extra basic aviation premium?

A. Yes, sir.

Q. Does that premium appear in the rate book?

Mr. Boyle: Objection, Your Honor, as not the best evidence.

Mr. Walsh: Now, if Your Honor please, this is proper evidence. Counsel inquired of Mr. Price if

(Testimony of Jonas Svendsen.)

He had his rate book with him on the night of August 10th; if he had made calculations. And I think we are entitled to show that certain things that do not appear in the rate book an agent is unable to quote without obtaining that information.

The Court: During the trial of this case I have come to the conclusion that the issues are very narrow, and it is immaterial. The objection will be sustained.

Mr. Walsh: Q. Mr. Svendsen, can you tell us if that Exhibit 1 you have in your hand, the application, had been completed on Part B and Part C, and had been received in your department? And assuming that the plan of insurance applied for was whole life family income, with the income of \$10.00 per month per thousand, permanent insurance to be \$10,000. And if you had received a check for \$53.36, would the [197] application have been approved?

Mr. Boyle: Objection;—

A. No, sir.

The Court: Just a minute.

The answer may be stricken.

Mr. Boyle: Immaterial. Calling for an opinion and conclusion of the witness. Self-serving. Hearsay. Speculative.

The Court: Objection will be sustained.

Mr. Walsh: Q. If, Mr. Svendsen, that application had been completed, Parts A, B, and C, as it calls for, and if it had been approved, what would be the first full month's premium?

(Testimony of Jonas Svendsen.)

Mr. Boyle: Objection, Your Honor. The same objection as made to the last question stated by counsel.

Mr. Walsh: That goes to the very gist of this case, Your Honor. We are entitled to show what the full first premium would have been.

The Court: Objection will be sustained.

Mr. Walsh: Your Honor, I don't quite follow this.

The Court: Well, this Court has made a mistake, in my opinion, in admitting so much testimony where I should have sustained the objection. This whole thing comes right down to the narrow issue, Was the contract completed at the time the receipt was given and the check was paid?

Any statements by witnesses of the insurance company, or [198] anyone else, in connection with what they would have done or what they would have charged, or anything in that respect, I think, is entirely immaterial.

Mr. Walsh: Well, let me say this, first:—

The Court: You have some objections in the record that are good.

Mr. Walsh: Well, I think it is material on the issues of this case to show whether or not there was a completed application. The plaintiff is claiming that all they have to do is to sign Part A.

The Court: That is just the question on the application, itself. The application shows just what was done, and it shows what part of it was not completed, and I don't see any necessity of someone

(Testimony of Jonas Svendsen.)

else trying to interpret this contract. I think it is for the Court to interpret.

Mr. Walsh: Well, we come to the matter of the premium, Your Honor. Now, evidence was allowed on the part of the plaintiff to testify that she was told by the agent that \$53.36 was the full first premium.

The Court: That testimony was all between the agent and the parties involved.

Mr. Walsh: Yes.

The Court: This party wasn't there, and anything that he might have decided as to what would be done with this application, or anything, is not material. [199]

Mr. Walsh: Well, I think this would be relevant, Your Honor: The information to be obtained on the extra aviation premium had to come from Mr. Svendsen. Now, we have an application here where it is a very difficult thing for an agent to calculate a premium because, in the first place, the applicant wanted to pay on a monthly basis. There is a certain part of this combination policy for which the premium is set forth in the rate book. You can look up age 35, whole life family income providing \$10.00 per thousand per month income, and you can find the annual, semi-annual, quarterly, and monthly premiums. But you cannot find in the rate book the quarterly premium for the extra aviation risk, and it can only come from this source. And it was only quoted on an annual basis. And the questions were asked of Mr. Price by counsel if he made

(Testimony of Jonas Svendsen.)

computations, and there you have a situation where the agent is confronted with a difficult thing. And his testimony was that he did the best that he could; that he did not tell the applicant that that was the full first premium. I want to show why, and I want to show what the premium would be, what the correct premium would be, Your Honor, to show that that was not the full first premium.

Now, if it is counsel's position that he is going to rely upon what he has pleaded in his complaint, then there isn't any question about it being a full first premium, because the document merely says the money was paid on account. [200]

If all this testimony is going to be stricken, including Mrs. Kenny's, as to what the agent told her, that's all right.

The Court: I am not going to say at this time.

Mr. Walsh: There will be no evidence before the Court except that there was paid on account a certain amount of money. Now, I think if the Court is going to consider that evidence, then we should be allowed to prove what the full first premium was. Otherwise, I think we are subjected to prejudicial error.

The Court: Well, it might be well for you to have some error in the record. If I were you, I wouldn't complain about having something in the record to overturn the Court on. All I can do is the best I can. If I am wrong, there is a higher court with jurisdiction to straighten me out, and I think I have ruled correctly.

(Testimony of Jonas Svendsen.)

Mr. Walsh: Well, I will ask the question again.

Q. Can you tell me, Mr. Svendsen, what the premium would be on whole life family income, permanent insurance \$10,000, the income to be \$10.00 per month per thousand for 20 years, decreasing term?

Mr. Boyle: Objection, Your Honor—self-serving.

Mr. Walsh: Q. Intermediate class.

Mr. Boyle: Calls for a conclusion and opinion of the witness. Proper foundation had not been laid. All the facts in evidence have not been stated. It is hearsay and self-serving. [201]

The Court: The objection will be sustained.

Mr. Walsh: I have something else that I would like to introduce here, and I think under the California rules this can be done, particularly under the case on which plaintiff relies mostly.

Mr. Boyle: Counsel, please—

Mr. Walsh: I will offer to put in evidence a sample policy that would have been issued had the application have been approved, because the case of Ransom against Penn Mutual [202] made a point of the fact that the defendant did not put into evidence the policy showing the terms and conditions for which the application was made. So upon that authority I am going to ask Mr. Svendsen if—

Would you like to see this, Counsel?

Mr. Boyle: Please.

(Mr. Walsh hands document to Mr. Boyle.)

The Court: You might take a few moments to look that over. We will take a few moments' recess.

(Short recess.)

(Testimony of Jonas Svendsen.)

Mr. Walsh: Q. You have Plaintiff's Exhibit 1?

A. Yes, sir, right here.

Q. Will you turn to Part A of the application where it shows the classification? That's marked "Intermediate"? A. That's correct.

Mr. Boyle: Your Honor, the record here shows there are two marks in "Classification."

Mr. Walsh: It has been testified to that the correct marking was——

The Court: Yes, the marks have been explained.

Mr. Walsh: Q. Does the weight of an applicant, Mr. Svendsen, have anything to do with the classification? A. Yes, sir.

Mr. Boyle: Objection, Your Honor: incompetent, irrelevant and immaterial; self-serving; hearsay; calling for the [203] opinion and conclusion of the witness.

The Court: The answer may be stricken and the objection will be sustained.

Mr. Walsh: Q. Does the weight of the applicant have anything to do with the amount of the premium?

Mr. Boyle: Objection, Your Honor; the same objection made to the last question stated by counsel.

The Court: Objection will be sustained.

Mr. Walsh: Q. Mr. Svendsen, assuming that the applicant was age 35, attains age 35 at the time of the application, and he was approximately six feet two in height, six feet one in his bare feet, and weighed 224 or 225 pounds without his clothing, would he qualify for an ordinary classification?

(Testimony of Jonas Svendsen.)

Mr. Boyle: Objection, Your Honor; same objection as stated to the last question of counsel.

The Court: Objection will be sustained.

Mr. Walsh: Q. If the application, Mr. Svendsen, had been completed and approved for the plan of whole life, family income, with \$10,000 permanent insurance, the income to be \$10.00 per month per \$1,000 at age 35, and the proper first full month's premium had been paid and all of the conditions had been complied with, would the company have issued a policy?

Mr. Boyle: Objection; incompetent, irrelevant and immaterial; hearsay; self-serving; the proper foundation has not [204] been laid; and assumes facts not in evidence.

The Court: Objection will be sustained.

Mr. Walsh: Well, Your Honor, the case of Ransom against Penn Mutual made a point of the fact that the company did not put into evidence the type of policy showing the terms and conditions.

The Court: You have not offered the policy.

Mr. Walsh: Beg your pardon?

The Court: I say, you haven't offered the policy.

Mr. Walsh: I am trying to lay the foundation for it.

The Court: I don't think that answers it. Lay the foundation.

Mr. Walsh: All right.

Q. I show you a sample policy, Mr. Svendsen, and ask you if that is the form of policy that would

(Testimony of Jonas Svendsen.)

have been issued upon the conditions I outlined in the previous question?

Mr. Boyle: Objection, Your Honor. Same objection stated to the previous question.

Mr. Walsh: I will submit the ruling, Your Honor.

The Court: Well, I don't just exactly like the way your question is framed.

Mr. Walsh: Well, I will reframe the question.

The Court: You are putting in the answer to the question that I sustained the objection to. My thought is, maybe—well, perhaps I shouldn't give my thought. You may ask your [205] question. I was about to frame the question for you the way I thought it should be framed. I will let you ask it.

Mr. Walsh: What was your ruling?

The Court: I sustained the objection now, but I think you have a way to put that policy in.

Mr. Walsh: Do you wish me to reframe the question?

The Court: Well, I would suggest—I make this suggestion: This is a Court case, and I suggest you just ask him if this is the type policy that would have been issued if that application had been completed.

Mr. Walsh: Suppose I put it this way:

Q. Had the application been completed and a policy issued, is that the form of policy and does that show the terms and conditions upon which the policy would have been issued?

A. Yes.

Mr. Boyle: Now, may the record show again——

The Court: It may show your objection on the same grounds.

Mr. Boyle: On the same grounds.

The Court: But I will overrule it, and if he wants to offer this policy in evidence now, and he has asked that question, I will admit the policy subject to a later determination as to its admissibility. I am inclined to think it is admissible, but I won't find on it now; I will reserve my ruling. But I will admit it.

Mr. Boyle: Your Honor, this particular form is not [206] merely a sample form. There are matters typed in on the face of this policy that——

The Court: Let me examine it.

Mr. Walsh: Well, naturally it shows the amount of a permanent insurance; it shows the monthly income; and it shows the premium.

Mr. Boyle: This is not a sample policy. In other words, Your Honor, in an effort to get matters into this record that are inadmissible, they have——

Mr. Walsh: I don't know what's inadmissible about trying to defend a case.

The Court: I will admit this policy with the figures that are typewritten in stricken from it, and I will not admit the policy in its entirety with the figures typed in.

Mr. Boyle: Likewise, Your Honor, there is a rider attached to that. I think it is the last page.

The Court: The typewritten portion of that will be stricken, also. The rest is admitted.

Mr. Walsh: One further thing before I offer that: I call Your Honor's attention to the California Insurance Code Section 10113 (reading):

"Every policy of life, disability, or life and disability insurance issued or delivered within this State on or after the 1st day of January, 1936, by any insurer doing such business within this State, [207] shall contain and be deemed to constitute the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, applications, or other writings of either of the parties thereto or of any other person unless the same are endorsed upon or attached to the policies."

Now, I should like to call Your Honor's attention to this. Perhaps you can find it for me, Mr. Svendsen, more quickly—the provision in here about the policy and the application shall constitute the entire contract (handing document to the witness).

The Witness: It is under Clause 8 here, Mr. Walsh, I think—under Paragraph 8, and the subtitle "The entire contract." I think that's what you have reference to.

Mr. Walsh: On page 3 under "Provisions and Benefits," No. 8 (reading):

"Entire Contract. This policy and the application therefor, a copy of which is attached hereto, as a part hereof, constitute the entire contract between the parties, and all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall

avoid this policy or be used in defense of a claim hereunder unless it is contained in the [208] application therefor, and a copy of such application is attached to this policy when issued.”

Q. Now, Mr. Svendsen, what parts of the application are attached to the policy and made a part thereof under that provision?

Mr. Boyle: Objection, Your Honor. The same objection as stated to the previous questions put to this witness.

The Court: Objection will be sustained.

Mr. Walsh: I have made an offer, Your Honor, to introduce the form of policy, and attempted to show that Part A and Part B of the application would be attached to and become a part of the policy, and I again make that offer of proof.

The Court: The objection is still sustained; the offer will be denied.

Mr. Walsh: Very well. No further questions.

Mr. Boyle: Are you going to put the sample in evidence?

Mr. Walsh: No.

Mr. Boyle: No questions, Your Honor.

(Witness excused.)

The Court: Call your next witness.

Mr. Walsh: The defense rests, Your Honor.

(Thereupon the Defendant rested its case in chief.)

Mr. Boyle: Your Honor, may the record show that counsel for the defense did not place the sample policy in evidence, [209] though the Court indicated it was admissible and the offer was made?

Mr. Walsh: Let the record show that I made an offer to put into evidence the policy that would have been issued had the certain terms and conditions been complied with, but the offer was refused by the Court.

The Court: No, I didn't refuse that offer. The record is clear on it, that I told you you could introduce that sample policy if the typewritten portions of it that were filled in were stricken. But the form could be admitted. That was the Court's ruling.

Anything further?

Mr. Walsh: I will offer it, then.

The Court: It may be admitted subject to the same ruling that I made.

The Clerk: Defendant's Exhibit H in evidence.

(The form of policy referred to was received in evidence and marked Defendant's Exhibit H.)

The Court: I will reserve my ruling on the admissibility of it.

Mr. Boyle: May it please Your Honor, the plaintiff has no rebuttal.

(Whereupon, following colloquy between the Court and counsel on the manner of submission, the matter was submitted on briefs, 30, 30 and 15.) [210]

STIPULATION TO AUGMENT RECORD

On Tuesday, June 25, 1957, Mr. Burton L. Walsh and Mr. J. J. Quigley appeared before Hon. Chase

A. Clark in chambers and the following proceedings were had.

Mr. Walsh: Mr. Boyle and I were both under the impression that Mr. Price had testified that after Grant signed the application on August 10th he then took it to Dr. Blaisdell, the examining physician, then picked it up from him at Dr. Blaisdell's office sometime before August 20th. But in looking through the transcript, we cannot find that in there, and if we could augment the record by stipulation we would appreciate it.

We were both under the impression, and there is no question about it, that Plaintiff's Exhibit 1, the application, was taken by Mr. Price to Dr. Blaisdell's office.

The Court: All right.

Mr. Walsh: Will you add that to the record as an augmentation of the record in these words:

"After August 10, 1954, Mr. Price took the Plaintiff's Exhibit 1 to Dr. Blaisdell's office and left it there, and then Mr. Price picked it up after Mr. Grant's death, and some time before August 20, 1954, and sent it to Mr. Wigham."

The Court: That is the way I understood it, anyway.

Mr. Walsh: That was orally agreed to over the telephone this morning between Mr. Boyle and myself.

The Court: You can enter that as a stipulation.

[Endorsed]: Filed September 11, 1957.

pany, intends to rely on the following points on appeal:

1. The final Judgment heretofore entered in the Court below is against the law.

2. The evidence is not sufficient to support said Judgment and said Judgment is against the evidence.

3. The Court erred in finding as a fact in Finding of Fact No. II that "Plaintiff is * * * the beneficiary named in the contract of insurance sued upon."

4. The Court erred in finding such broad facts of agency in Finding No. IV.

5. All of Finding No. V, except the first sentence, is erroneous and is not supported by the evidence.

6. Finding No. VI is erroneous and contrary to the evidence.

7. Finding No. VII is erroneous and contrary to the evidence.

8. Finding No. VIII is erroneous and contrary to the evidence and does not fully and fairly state the facts as to what occurred on August 10, 1954.

9. Finding No. IX is clearly erroneous and contrary to the evidence and states conclusions and not facts.

10. Finding No. X is erroneous and not supported by the evidence and states conclusions and does not fairly state the facts for the period of time it covers.

11. Finding No. XI is erroneous in that it states matters, after the first line, that are irrelevant to the issues here and relate to the first cause of action which was dismissed.

12. Finding No. XII is erroneous and not supported by the evidence.

13. The Court erred in failing to make any finding on a material issue, namely, that on August 14, 1954 Defendant returned Peter Grant's check for \$53.36 to Margaret L. Grant and she accepted it and no tender has ever been made of any amount of money since then to the Metropolitan Life Insurance Company on account of this Application for insurance.

14. The Court erred in failing to make any finding on a material issue, namely, that before August 10, 1954 Metropolitan Life Insurance Company notified Peter Grant in writing that it could make no definite offer to insure him until the completed Application, including the medical examination, and also a Mercantile report, "have" been "viewed" by the Chief Underwriter at the Metropolitan's Pacific Coast Head Office in San Francisco.

15. The Court erred in failing to make any finding on a material issue, namely, that on August 10, 1954 at the time Part A of the Application was signed by Peter Grant he was told by George Price, soliciting agent for the Metropolitan Life Insurance Company, that "He had to have a medical examination for this insurance."; that "He was to see Dr. Blaisdell."; that Dr. Blaisdell's name was writ-

ten into the Receipt (Plaintiff's Exhibit 2); and that the Plaintiff Margaret L. Grant, went to Dr. Blaisdell's office on August 12, 1954 and made the appointment for her husband Peter Grant to see Dr. Blaisdell on August 13, 1954 at 3:30 p.m.

16. The Court erred in failing to make a finding on a material issue, namely, that Peter Grant did not submit to nor have a medical examination by Dr. Blaisdell, the Medical Examiner for the Metropolitan Life Insurance Company, or any other of the company's Medical Examiners for the insurance applied for and on August 13, 1954 said Application in its present form (Plaintiff's Exhibit 2) was in the possession of Dr. Blaisdell.

17. The Court erred in failing to make a finding on a material issue, namely, "There was no representation made at that time on August 10th by Mr. Price or at any other time as to when this insurance would become effective."

18. Conclusion of Law No. II is erroneous and against the law and not supported by the findings or the evidence.

19. Conclusion of Law No. III is erroneous and against the law and not supported by the findings or the evidence.

20. Conclusion of Law No. IV is erroneous and against the law and not supported by the findings or the evidence.

21. Conclusion of Law No. V is erroneous and against the law and not supported by the findings or the evidence.

22. The Court erred in not granting Defendant's motion to strike the opinion of Dr. Sambuck as to the medical acceptability of Peter Grant as a standard insurance risk on June 8, 1954 and it erred in failing to sustain all other objections by Defendant to Dr. Sambuck's testimony.

23. The Court erred in sustaining Plaintiff's objection to Mr. Price's testimony that he didn't know exactly what the whole first premium would be.

24. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify that the Application, if completed, would have come to his division.

25. The Court erred in granting Plaintiff's motion to strike the testimony of Mr. Svendsen that if the completed Application had been received by him with the payment of \$53.36 the Application would not have been approved.

26. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify what the full first month's premium would be if the Application had been completed and approved.

27. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify as to the amount of premium on the amount and plan of the insurance applied for.

28. The Court erred in refusing to allow Mr. Svendsen, Chief Underwriter, to testify that the weight of an applicant had anything to do with the classification of the applicant or the amount of the premium.

II.

Appellant's Designation of all of the Record Which
is Material to the Consideration of the Appeal.

1. Petition for Removal from the Superior Court of Santa Cruz County, with copy of Complaint and Summons attached;
2. Bond on Removal;
3. Notice of Defendant of Petition for Removal;
4. Answer of Defendant;
5. First Amended Complaint;
6. Answer to First Amended Complaint;
7. Order of Dismissal of First Cause of Action;
8. Memorandum Opinion of Court;
9. Excerpt from Docket Entries as follows:
"Mar. 18—Lodged findings & conclusions by plttf)
"Mar 24—Filed objections of deft. to proposed findings & conclusions by plttf.";
10. Findings of Fact and Conclusions of Law;
11. Judgment;
12. Notice of Appeal;
13. Supersedeas Bond;
14. Appellant's Designation of Record on Appeal;
15. Order Extending Time to Docket Record on Appeal;
16. Reporter's Transcript of Trial Proceedings

June 19 and 20, 1957 and Stipulation to augment Record dated June 25, 1957;

17. Stipulation concerning consideration of original Exhibits dated August 13, 1958 and on file herein;

18. Plaintiff's Exhibits: 1, 2, 3, 4, 5 and 6. Only Part A of Plaintiff's Exhibit 1 need be printed in the record. Appellant supplies herewith seven true and correct copies of the entire Exhibit 1;

19. Defendant's Exhibits: A, B, C, D, E, F, G, and H. Defendant's Exhibit H need not be printed in the record. Appellant supplies herewith seven true and correct copies of entire Exhibit H;

20. This Statement of Points on Appeal and Designation of the Record which is Material to the Consideration of the Appeal.

Dated: August 15, 1958.

KNIGHT, BOLAND & RIORDAN,
/s/ BURTON L. WALSH,
Attorneys for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 1, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING CONSIDERA-
TION OF ORIGINAL EXHIBITS

It is hereby stipulated that each and all of the exhibits herein may be used and considered in their original form by the above entitled Court and the parties to this appeal without said exhibits being printed in the record.

Dated: August 13, 1958.

WYCKOFF, PARKER, BOYLE &
POPE,

/s/ By PHILIP T. BOYLE,
Attorneys for Appellee

KNIGHT, BOLAND & RIORDAN,
BURTON L. WALSH,

/s/ By BURTON L. WALSH,
Attorneys for Appellant

[Endorsed: Filed August 15, 1958. Paul P.
O'Brien, Clerk.]

